Supreme Court, U.S.
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No.

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In The

Supreme Court of the United States

October Term, 1994

In Re

WALTER F. BIGGINS,

Petition for a Writ of Mandamus/or in the Alternative, for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR WRIT OF MANDAMUS/CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Seventh Amendment to the Constitution, Fed. R. Civ. P. 38 and the prior mandate of this Court prohibited the First Circuit Court of Appeals from ordering a new trial, *sua sponte*, based on its speculation as to what the jury believed where there was no finding of error in the proceedings below, the trial court had denied a motion for new trial (which denial was not appealed to this Court) and where there was sufficient evidence to support the verdict.

2. Whether the First Circuit Court of Appeals violated the mandate of this Court when, on remand, it refused to reconsider the sufficiency of the evidence for the petitioner's verdict under the ADEA as ordered by this Court and instead ordered a new trial *sua sponte* based on its opinion that otherwise properly admitted evidence "contaminated" the jury verdict even though this Court's decision in *St. Mary's Honor Center v. Hicks* compelled a finding in favor of the petitioner had the en banc court reconsidered the sufficiency of the evidence.

LIST OF PARTIES

The parties to the proceeding are Walter F. Biggins, petitioner and plaintiff below; Hazen Paper Company, Robert Hazen and Thomas N. Hazen, defendants below; and respondents the Honorable Juan R. Torruella, Chief Judge, Hugh H. Bownes, Senior Circuit Judge, and Bruce M. Selya, Conrad K. Cyr, Michael Boudin and Norman H. Stahl, Circuit Judges of the United States Court of Appeals for the First Circuit.

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Petitioner Walter F. Biggins respectfully prays that a writ of mandamus issue to the United States Court of Appeals for the first Circuit directing that judgment be entered for the petitioner, that the order of the en banc court be vacated and that the October 18, 1993, order of the panel of the First Circuit be reinstated, or, in the alternative, that a writ of certiorari be granted to review the judgment and order of the Court of Appeals for the First Circuit, entered in the above-entitled case on June 27, 1994.

OPINIONS BELOW

The en banc order of the United States Court of Appeals for the First Circuit, entered on June 27, 1994, on Hazen Paper Company's petition for rehearing and suggestion for rehearing en banc, has not been reported. A copy of this order is attached to this petition as Appendix B (Pet. App. pp. 8a-12a). The panel opinion of the United States Court of Appeals for the First Circuit, entered on October 18, 1993, is attached as Appendix D (Pet. App. pp. 15a-27a). The memorandum and order of the district court for Massachusetts, rendered on Hazen Paper Company's post-trial motions and dated April 5, 1991, has not been reported and is attached as Appendix F (Pet. App. 29a-58a). An opinion by this Court and an opinion by the United States Court of Appeals for the First Circuit, rendered at prior stages of the present proceeding, are reported, respectively, in No. 91-1600, slip op., 113 S. Ct. 1701 and 953 F.2d 1405.

STATEMENT OF JURISDICTION

The date of the order and judgment of the Court of Appeals for the First Circuit sought to be reviewed is June 27, 1994.

The jurisdiction of this Court is invoked under Section 1651(a) or, in the alternative, under Section 1254 of Title 28, United States Code.

Relief is not available in any other court. The petitioner, Walter F. Biggins, filed a petition for rehearing in the First Circuit following entry of the June 27, 1994, order of the en banc court.

Plaintiff-appellee's petition for rehearing was denied (Pet. App. p. 2a). No other procedure is available to the petitioner in the First Circuit. This Court has authority pursuant to 28 U.S.C. § 1651(a) to issue an extraordinary writ in aid of its appellate jurisdiction to correct an error in a lower court and to require a lower court to obey the mandate of this Court. This case presents an important question under the Seventh Amendment and under Federal Procedure and a situation where the Circuit Court is plainly wrong both substantively and procedurally.

STATUTES AND CONSTITUTIONAL PROVISIONS

Petitioner relies on the Seventh Amendment to the Constitution, 29 U.S.C. § 623 and Fed. R. Civ. P. 38(a). *See* App. G, Pet. App. 68a for text.

STATEMENT OF THE CASE

A. Proceedings Below.

The plaintiff, Walter Biggins, was terminated from his employment by the defendant, Hazen Paper Company, and alleged in his complaint violations of 29 U.S.C. § 621, *et seq.*, The Age Discrimination in Employment Act; 29 U.S.C. §§ 1001, *et seq.* Employee Retirement Income Security Act; the Massachusetts Civil Rights Act Mass. Gen. L. c. 12 § 11I; breach of contract; fraud; conversion; and wrongful discharge.

The case was tried for five days to a jury which found that the defendants willfully violated the ADEA, violated ERISA, committed fraud, breached plaintiff's employment contract, and wrongfully discharged him.[1]

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1. Damages assessed were as follows:

ADEA $560,775.00

(Cont'd)

Respondents filed post-trial motions for judgment notwithstanding the verdict, to alter or amend the judgment and for a new trial, pursuant to Fed. R. Civ. P. 59. In their motion for a new trial, the respondents asserted that the jury could have confused the issues of pension discrimination and age discrimination and that, therefore, a new trial should be had.

After a careful and detailed consideration of the distinctions between ERISA and the ADEA, the trial judge denied the motion for new trial holding that "the Court finds no internal inconsistency in the verdict and the motion for new trial is denied." (Pet. App. 49a). The trial court determined that it was possible for an employer to have dual illegal motives with respect to both age and pension status. (Pet. App. 49a).

In the remainder of his post-trial opinion, the trial judge allowed the respondents' motion for judgment notwithstanding the verdict as to willfulness under the ADEA and as to the petitioner's claim under the Massachusetts Civil Rights Act. The trial judge denied the motion for judgment notwithstanding the verdict as to the remaining counts, including a challenge to the sufficiency of the evidence under the ADEA. ((Pet. App. 35a, 38a-30a, 42a).

Both parties filed appeals to the First Circuit Court of Appeals. On January 8, 1992, the First Circuit issued its decision which was reported at 953 F.2d 1405 (1st Cir. 1992). The court affirmed the judgment on the ADEA finding of age discrimination but reversed the trial court on the issue of willfulness under the ADEA, finding the evidence sufficient to sustain the jury's finding. *Biggins v. Hazen Paper Co.*, 953 F.2d at 1411-1412. The court affirmed the findings of a violation of ERISA, fraud and wrongful discharge,

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(Cont'd)

ERISA	$100,000.00
Fraud	$315,000.00
Breach of Contract	$266,897.00
Wrongful Discharge	$ 1.00

but reversed the judgment in favor of petitioner for breach of contract. The court reduced the amount of damages awarded the petitioner under the ADEA (under the respondents' motion to alter or amend the judgment) and affirmed the trial court in all other respects, including its denial of the respondents' motion for a new trial. *Biggins* at 1412-1415.

Respondents filed a petition for rehearing and suggestion for rehearing en banc. Significantly, in that petition, there was absolutely no reference to the district court's denial of the motion for a new trial and the Circuit Court's affirmance of it. The petition was denied. Respondents then filed a petition for a Writ of Certiorari in this Court seeking review of two issues solely related to the rulings on the motion for judgment notwithstanding the verdict. Again this petition, like the motion for rehearing addressed to the First Circuit, made absolutely no reference to the denial of the motion for new trial by the district court and did not suggest in any way that a new trial would be an appropriate order or remedy. This Court granted certiorari on June 22,1992, to decide two questions:

> . . . does an employer's interference with the vesting of pension benefits violate the ADEA? Second, does the *Thurston* standard for liquidated damages apply to the case where the predicate ADEA violation is not a formal, facially discriminatory policy, as in *Thurston,* but rather an informal decision by the employer that was motivated by the employee's age?

Hazen Paper Co. v. Biggins, No. 91-1600, slip op. at 3, 113 S. Ct. 1701, 1705 (1993).

The case was argued on January 13, 1993, and this Court issued its opinion on April 20,1993. This Court held that pension

discrimination based on years of service (as opposed to age) could not be the evidentiary basis for upholding a jury verdict under the ADEA. Since the Court of Appeals had in part relied on this evidence and because "there was additional evidentiary support for ADEA liability," this Court, after reciting the evidence of age bias presented at trial, remanded the case with the following statement:

> In the ordinary ADEA case, indirect evidence of this kind may well suffice to support liability if the plaintiff also shows that the employer's explanation for its decision—here, that respondent had been disloyal to Hazen Paper by doing business with its competitors — is "unworthy of credence" *Aikens*, 460 U.S., at 716 (quoting *Burdine*, 450 U.S. at 256). But inferring age-motivation from the implausibility of the employer's explanation may be problematic in cases where other unsavory motives, such as pension interference, were present. *This issue is now before us in the Title VII context, see* Hicks v. St. Mary's Honor Center, *970 F.2d 487 (CA8 1992), cert. granted, 506 U.S. (1993), and we will not address it prematurely. We therefore remand the case for the Court of Appeals to reconsider whether the jury had sufficient evidence to find an ADEA violation.* (emphasis added).

Hazen Paper Co. v. Biggins, No. 91-1600, slip. op. at 8, 9, 113 S. Ct. 1701, 1704-1705(1993).

On June 25, 1993, this Court rendered its decision in *St. Mary's Honor Center v. Hicks*, No. 92-602, slip op., 113 S. Ct. 2742 (1993), holding, as to the above referenced issue, that the rejection of the defendants' proffered reasons is enough at law to sustain a

finding of discrimination, provided there is a finding of discrimination. *St. Mary's,* slip op. at 8 n. 4, 113 S. Ct. at 2749 n. 4. After this case was remanded to the First Circuit, both parties were requested by the court, in accordance with this Court's mandate, to submit briefs directed to the question of "whether the jury had sufficient evidence to find an ADEA violation." (*Hazen Paper,* slip op. at 9, 113 S. Ct. at 1708).

Neither party nor the Circuit Court suggested the issue of a new trial was still open or that the court had any grounds or power to order one.

On October 18, 1993, the Court of Appeals panel issued its decision. The court found that absent the pension evidence there was still sufficient evidence of a violation of the ADEA:

> Because the jury must have found that Hazen Paper's explanation for its decision—that plaintiff had been a disloyal employee—was "unworthy of credence," the indirect evidence was sufficient for the jury's finding of discrimination. In other words, plaintiff has met his burden of proving discrimination: he proved a prima facie case; the jury disbelieved the employer's reasons for discharging the plaintiff; and the plaintiff met his ultimate burden of persuasion by adducing additional evidence of age discrimination. See *St. Mary's,* 113 S. Ct. at 2742.
>
> Reading *Hazen Paper* and *St. Mary's* in tandem compels us to conclude that, absent any evidence of interference with the vesting of plaintiff's pension, there was sufficient evidence for the jury to find an ADEA violation. (Pet. App. 26a).

Following the decision, the respondents filed a petition for rehearing and suggestion for rehearing en banc. That petition asked the court to reverse the panel's holding and find the evidence insufficient. Once again, nothing in the petition requested or suggested any grounds for the ordering of a new trial. Nor did the petition make any claim regarding the jury's consideration of the pension evidence. That petition was filed on October 29, 1993. Over four months later the en banc court issued an order that the parties show cause why the ADEA count alone should not be remanded for a new trial, stating:

> The petition for rehearing en banc suggests that we rehear this case only with respect to plaintiff's age discrimination claim. Having examined the record, the en banc court is concerned whether the likelihood that the jury took negative account of the defendants' ostensible desire to deprive the plaintiff of a pension—a factor that the Supreme Court outlawed as a *basis* for the ADEA verdict, *see Hazen Paper Co. v. Biggins,* 113 S. Ct. 1701, 1705-07 (1993)—is sufficiently great that the interests of justice require a new trial on the age discrimination claim. (Pet. App. 14a).

The parties filed briefs on this issue. Petitioner objected to the court's suggestion that it could or should now order a new trial at all or on the grounds suggested and noted that a motion for new trial had been denied by the trial judge and never appealed past the first appellate panel.

On June 27, 1994 the en banc court issued an order[2]

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2. No opinion was written and, therefore, none published as Local Rule 36.2(b)3 would seem to require. No mention was made of Fed. R. App. P. 35(a) as to whether an en banc proceeding was even appropriate. The present case certainly did not meet the criteria provided by that rule, and no effort was made to explain why an en banc proceeding was ordered.

withdrawing the panel's opinion and remanding the ADEA count for a new trial. The order stated in part:

> The court . . . has concluded that the likelihood of verdict contamination with respect to the count at issue is sufficiently great that the interests of justice require a full new trial on the age discrimination claim. (Pet. App. 9a).

No other justification or reason for a new trial order was stated. No opinion was written.

In response to the March 1, 1994, Order, the petitioner had argued, *inter alia,* that if a new trial were to be ordered, the petitioner should be permitted to seek additional damages on his common law claims since the jury, following the direction of the district court, had originally allocated damages among the counts, and the plaintiff could have been awarded his back pay (awarded under the ADEA) under the fraud count had the jury not been told not to duplicate damages. In its June 27th Order the court did discuss this at some length, holding that it had no jurisdiction to grant a new trial on damages under the common law counts because no en banc review of those claims had been sought and because the petitioner had not originally made such claims part of his cross appeal. The court did not explain how it could have jurisdiction over the issue of a new trial on only one count when no en banc review had ever been sought of the trial court's denial of a new trial (and panel's affirmation), and when the issue had been fully put to rest by the first appellate panel. Petitioner filed a petition for rehearing objecting to the court's double standard and its denial of petitioner's constitutional and statutory right to a trial by jury. Rehearing was denied on August 10, 1994. (Pet. App. 20a).

B. Statement of Facts.

The evidence at trial showed that Biggins was employed by

the defendants from 1977 to June of 1986 as their technical director. (C.A. App. 458). Hazen Paper Company is a "paper converter" located in Holyoke, Massachusetts, with annual sales of approximately 40 million dollars. (C.A. App. 290-291). In the spring of 1986, Robert and Thomas Hazen confronted Biggins, then sixty-two, and accused him of disloyalty to the company, claiming he was involved in two businesses with his son. (C.A. App. 357-361). Biggins responded that the Hazens had given prior approval to his activities which were limited to advising his son. (C.A. App. 362-363). These businesses did not compete with Hazen, had never made any money, and one had been out of business for two years. (C.A. App. 362-370). The Hazens demanded that Biggins sign an agreement, which included a burdensome non-compete clause and confidentiality covenants. (C.A. App. 1138-1142). None of the younger employees in Biggins' department, in their thirties, was required to sign such an agreement. (C.A. App. 373). When Biggins objected to the terms he was fired. Biggins' younger successor, also in his thirties, was given beneficial terms in his agreement, which had been denied Biggins, including a covenant not to compete that encompassed six months instead of the two years required of Biggins. The successor was to be compensated while he did not compete, unlike Biggins who would not be compensated during the entire twenty-four months of his non-compete. (C.A. App. 775, 779, 1501-1508). The Hazens then tried to obtain Biggins' continued services as a consultant without providing the normal benefits given the younger members of his department.

C. The Conduct of the Trial Vis-a-Vis the Pension and ADEA Issues.

The en banc court's order rested on its apparent belief that the jury took "negative account" of the pension evidence on the ADEA count. The court did not indicate what part of the record it was relying on in reaching this conclusion.

The trial judge's instructions to the jury (to which there were no relevant objections) on the ADEA count were devoid of any suggestion or implication that Mr. Biggins' pension status was in any way related to that count. The trial judge began his instruction as follows:

> Plaintiff has specified eight separate allegations called counts in his Complaint against Defendants. It is the duty of the jury to decide all eight counts.
>
> I will now instruct you on each of the eight counts, one by one.
>
> First, age discrimination. Plaintiff alleges that he was fired in violation of a Federal law, the Age Discrimination in Employment Act. The substance of this Federal law is that it is unlawful for an employer to discharge or otherwise discriminate against an employee over forty years old because of the employee's age. The purpose of the law is to promote the employment of older persons based on ability rather than age, and to prevent the arbitrary classifications of employees based on age. (C.A. App. 1082-1083).

The trial judge then went on to describe the *McDonnell Douglas*[3] shifting burden of proof analysis. The trial judge made clear that "[p]laintiff must prove by a preponderance of the evidence that the employer's reason is mere pretext—a show or a cover-up—for what was in truth a discriminatory purpose" (C.A. App. 1085) and that *age must have been the determining factor.*" (C.A. App. 1086) (Emphasis added.) There was no reference whatsoever to pension status. The trial judge began the instruction

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3. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

with the admonition that there were eight "separate" counts. (C.A. App. 1082). He then repeated and summarized the shifting burden test, again without reference to pension. (C.A. App. 1087-8). Next the trial judge went to the ERISA claim, and unambiguously distinguished its elements from those of the ADEA count. At the heart of the pension claim, he said, was the allegation that Mr. Biggins "would have become entitled to pension benefits within a short period of time, but that Defendants fired him before his benefits could vest." *Id.* at 1089. The required proof, said the judge, was a showing "that Defendants fired Plaintiff for the purpose of preventing vestment of pension benefits." *Id.* There was no mention of age in the ERISA instructions. The judge identified and addressed each count sequentially as did the special verdict form. There was a clear demarcation in the charge when he left one count for the next. In short, the court gave a detailed age discrimination instruction, a summarized one, and a repeated one, all without any suggestion that pension status was at all relevant.

REASONS FOR GRANTING THE WRITS OF MANDAMUS AND/OR CERTIORARI

These petitions raise two important issues regarding the authority of the Circuit Courts of Appeals under the Constitution and federal law with respect to the right to trial by jury in civil cases. The Circuit Court's action in this case is in conflict with all relevant prior decisions of this Court in that it ordered a new trial, *sua sponte*, because of the Circuit Court's own view of the evidence and the jury's conclusions, while not finding the trial court's denial of a new trial motion was an abuse of discretion, while the issue was no longer before it, and where it could find no errors of law in the trial nor lack of sufficiency in the evidence. Under the Seventh Amendment to the Constitution and under Fed. R. Civ. P. 38, the Court of Appeals had no power to grant a new trial here. The Circuit Court's action violates numerous basic precepts that are central to the right to trial by jury:

- It violates the established statutory and constitutional standard that only the trial court may make a discretionary grant of a new trial and that such a grant or demand may only be reviewed for abuse of discretion, if at all.

- Even where there is power in an appellate court to grant a new trial, this order violates the established standards for the grant of a new trial in that the court has done so without finding any error in the proceedings below (either in the instructions to the jury or the admission of evidence) and without finding any insufficiency in the evidence.

- The action of the Circuit Court of Appeals does not even meet the standards by which a trial court could grant a new trial: the verdict was not found to be against the great weight of the evidence, there was no misconduct by the participants, and there was no contention the verdict was excessive.

- The Circuit Court's order further violates basic principles of the right to jury trial by *assuming* that the jury either made a mistake on a question of fact or violated its instructions, by speculating as to the jury's motives (without foundation) and by implicitly assuming that the jury's verdict was inconsistent with the instructions given.

- It establishes the dangerous precedent of appellate judges nullifying jury verdicts and usurping parties' Seventh Amendment rights with no other standard than their perception of the "interests of justice."

Secondly, the Circuit Court refused to obey the mandate of this Court. This Court determined that Mr. Biggins could recover under the ADEA if there was sufficient evidence under the standards the Court was about to consider in *St. Mary's Honor Center v. Hicks*, No. 92-602, slip op., 113 S. Ct. 2742 (1993). The panel of the First Circuit determined that the petitioner had offered

sufficient evidence. The en banc court did not dispute this and should have entered judgment for the petitioner. Instead the en banc Circuit Court ignored the mandate and ordered a new trial on the basis of its own feelings and speculation about the jury's motives.

I.

THE COURT OF APPEALS ORDER CONFLICTS WITH THIS COURT'S ESTABLISHED LAW UNDER THE SEVENTH AMENDMENT AND THE FEDERAL RULES OF CIVIL PROCEDURE.

A. An Appellate Court Has No Power to Make a Discretionary Grant of a New Trial *Sua Sponte* Based on Its View of the Evidence.

The order of the Court of Appeals in this case violates several long-standing fundamental principles of the Seventh Amendment and of federal procedure as to trial by jury. The Court of Appeals lacks the authority to grant a new trial (absent an error of law or insufficiency of the evidence) for any reason, let alone on the grounds cited.

The Seventh Amendment provides:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.[4]

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4. The Seventh Amendment applies equally in actions to enforce statutory rights where the statute provides a right to trial by jury. *Curtis v. Loether*, 415 U.S. 189,193 (1974).

Fed. R. Civ. P. 38(a) provides:

> The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

This Court has consistently held for decades that this amendment prohibits a court from reexamining facts found by a jury in any manner other than that allowed at common law as it existed in 1791. *Colgrove v. Battin,* 413 U.S. 149 (1973). This includes a prohibition against action regarding a new trial by an appellate court for any reason other than an error of law in the proceedings below. The best known formulation of this standard was stated by the Court in *Parsons v. Bedford, Breedlove & Robeson,* 28 U.S. (3 Pet.) 433 (1830):

> But the other clause of the amendment is still more important and we read it as a substantial and independent clause. "No fact tried by jury shall be otherwise reexamined in any court of the United States than according to the rules of common law." This is a prohibition to the Courts of the United States to re-examine any facts tried by jury in any other manner. The only modes known to the common law to re-examine such facts are the granting of a new trial *by the Court where the issue was tried or to which the record was properly returnable* or the award of a venire facias de nova by an appellate court for some error of law which intervened in the proceedings.

Parsons at 447-8.

This standard still holds: it is *the trial court alone* to whom the

discretion belongs to grant a new trial. *McDonough Power Equip., Inc. v. Greenwood,* 464 U.S. 548, 556 (1984) (motions for new trial are committed to the discretion of the district court, and Court of Appeals was mistaken in granting new trial itself). *Allied Chem. Corp. v. Daiflon, Inc.,* 449 U.S. 33, 36 (1980) ("the authority to grant a new trial is confided almost entirely to the exercise of discretion on the part of the trial court").

While it is true that an appellate court could grant a new trial if it found an error of law in the proceedings below, or in limited circumstances if it found the evidence insufficient to sustain a finding, there is no such finding here. In fact, a panel of the Circuit Court twice found the evidence sufficient. The en banc court did not find the evidence insufficient, though the respondents had urged them to do so. There is no allegation of any error in the admission of evidence, no allegation of error in the jury instructions or in the conduct of counsel or the parties. In short, the appellate court took it upon itself to act as a trial court ruling on a motion for a new trial that was not even before it on review. In doing so, the court violated the basic principles of the Seventh Amendment, the common law and the Federal Rules of Civil Procedure. The error is compounded by the fact that the trial court itself ruled on a motion for new trial on the very same grounds and the defendants failed to preserve any objection beyond the first decision of the Circuit Court in January, 1992. Instead of reviewing that decision for abuse of discretion or even remanding the question to the district court for reconsideration, the appellate court completely ignored the trial court's ruling, without explanation.

B. Absent An Error of Law, Only the Trial Court May Order a New Trial, and that Decision May Only Be Reviewed for Abuse of Discretion.

In *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.,* 492 U.S. 257, 280 (1989), this Court stated with respect to the

"considerable deference" which must be given to a trial court's decision not to order a new trial:

> This is particularly true because the federal courts operate under the strictures of the Seventh Amendment. As a result, we are reluctant to stray too far from traditional common-law standards, or to take steps which ultimately might interfere with the proper role of the jury.

Browning-Ferris Indus. of Vt., Inc., at 280 n. 25.

Here the First Circuit had no such reluctance. It not only failed to provide deference, it quite totally and deliberately ignored the trial court's denial of a new trial on essentially the same issue.

While it has never been specifically decided by this Court that the denial of a new trial may be reviewed at all, if it may, it may be reviewed only under an abuse of discretion standard. *Browning-Ferris Indus. of Vt., Inc.*, at 279 n. 25. "The rule that this Court will not review the action of a federal trial court in granting or denying a motion for a new trial for error of fact has been settled by a long and unbroken line of decisions. . . ." *Fairmount Glass Co. v. Cub Fork Coal Co.*, 287 U.S. 474, 481 (1933). Motions for new trial, therefore, are "committed to the discretion of the district court." *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 556 (1984).

Compounding this error is the fact that the trial judge, in denying the motion for new trial, addressed essentially the same issue raised by the Circuit Court as its "concern" about the verdict, that is, whether the jury had confused the pension and age discrimination issues in ruling on both the ADEA and ERISA counts. In doing so the trial court correctly anticipated this Court's

ultimate decision that there can be dual liability under the ADEA and ERISA. *Hazen Paper Co.*, slip op. at 8, 113 S. Ct. at 1707. The trial judge discussed the proofs necessary under both statutes and found:

> Given this authority, the Court now holds that there may be more than one illegal determinative factor behind an employer's decision to discharge. *Plaintiff s theory in this case offers a good example, where the jury found that the Hazens discharged plaintiff because of his age and in order to interfere with pension rights* . . . [the] Court finds no internal inconsistency in the verdict, and the motion for new trial is denied (emphasis added). Pet. App. 48a-49a.

There is no reason to believe that this was not a proper exercise of discretion on the part of the trial judge, who clearly applied the correct principles of law in reaching his decision and who had the distinct advantage of being present at trial.

C. This Court's Prior Ruling Made Final the Denial of a New Trial.

The Circuit Court's error is more egregious due to the fact that the motion for new trial was no longer before the Circuit Court when it issued its order. The issues presented by the Hazens in their petition for certiorari to this Court did not include the appropriateness of the trial judge's denial of the motion for a new trial. This Court granted certiorari on two issues which related only to whether a judgment notwithstanding the verdict should have entered as to willfulness and/or the ADEA count. At that point the issue of whether a new trial should be granted had been finally resolved in favor of Mr. Biggins. Certainly nothing in this Court's decision indicated that the grant of a new trial was still at issue or

could be considered an appropriate remedy at this stage.[5]

On remand the Hazens did not attempt in any way to renew the issue of a new trial. After the second panel opinion, the respondents filed a motion for rehearing, and again, did not in any way raise the issue of a new trial. Curiously, in certain respects, the en banc court was quite concerned about its authority to act on matters no longer before it. Most of the June 27,1994, Order was devoted to the issue of whether the petitioner could, in light of a new trial's being ordered on the ADEA claim, retry damages under his state law claims because the jury had allocated his damages among the counts in accordance with the trial judge's instructions. The en banc court held it did not have jurisdiction to do this "because no en banc review of them was sought in a timely fashion." (Pet. App. 10). This is true. However, respondents had *never* sought en banc review of the denial of a new trial, despite having filed *two* rehearing petitions (after each panel opinion) and a petition for certiorari. If the same standard were applied to respondents, there would be no jurisdiction over the new trial issue.

The en banc court further held that it had no jurisdiction over these issues because the petitioner had not filed a protective cross appeal of the state law claims it had already won. This was also true. However, as noted above, respondents had never sought further review of the motion for a new trial after the first panel opinion, yet the court found no bar to consideration of that issue in the "interests of justice" while stating that *"no matter how the equities fall"* it could not take so "iconoclastic" a course as to grant a new trial on the issue of damages under the state law claims (emphasis added). (Pet. App. 12a).

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5. This Court did, however, discuss the relationship between the ADEA and ERISA holding that there could be dual liability under the two statutes. *Hazen Paper Co.* at 1707. This principle is at odds with the Circuit Court's presumption that there was a "likelihood" that the pension finding interfered with the ADEA finding.

If it is not absolutely clear that the en banc court applied a double standard, it is only because, in issuing the order, the Court never revealed whether it was acting on the abandoned motion for new trial. Although the en banc court spent several pages explaining why it would not order a new trial on damages under the common law claims, it never mentioned what motion or procedure it was acting on in granting the new trial under the ADEA. If the court were properly acting on a motion for new trial, it had the right to order a new trial as to all or some of the counts. *See Hasbrouck v. Texaco, Inc.*, 663 F.2d 930 (9th Cir. 1981), *cert. denied*, 459 U.S. 828 (1982), *on remand*, 634 F. Supp. 34 (1985). Presumably, therefore, the en banc court was not reviving the motion for a new trial. This would mean that the order was issued under the only matter still properly before it: the motion for judgment notwithstanding the verdict. But to grant a new trial under *that* motion the court would have to find grounds for the granting of the motion. The "likelihood" that the jury took "negative account" of the respondents' other illegal actions is manifestly not grounds for a judgment notwithstanding the verdict. There is simply no basis, within the Seventh Amendment or the Rules of Civil Procedure, for the en banc court to have taken the action it did.

D. Even If the Circuit Court Had the Power to Order a New Trial it Could Not Do So On the Grounds Stated.

Assuming *arguendo* that the en banc court had the power to order a new trial at this stage, the sketchy grounds stated in the court's order are not a permissible reason for the vacating of an otherwise valid jury verdict and should not be permitted to stand. The en banc court's order reverses the proper burden by requiring the petitioner to prove that the jury did not consider something impermissible, improperly speculates as to the jury's thoughts and motives, implicitly assumes the verdict to be inconsistent without attempting to harmonize it, assumes the jury disobeyed its instructions, and effectively "weighs the evidence" in contravention of the jury's constitutional and statutory role as finder of fact.

Even where the trial court properly has a motion for new trial before it, the only grounds for granting the motion are findings by the trial judge that: the verdict was against the great weight of the evidence; there was some error of law in the proceedings; the verdict was too large or too small; there was some misconduct by counsel tainting the verdict or by the jury. 11 Wright and Miller, *Federal Practice and Procedure* 2805 (1973).

None of these grounds was present here and the en banc court made no pretense that they were. Instead the en banc court cited a single reason which flies in the face of centuries of established law as to the proper grounds for review of a jury's verdict. Even worse, the en banc court's order took the jury's finding of illegal acts by the respondents under ERISA and used it as grounds for asserting that the proper evidence under ERISA "contaminated" the finding of age discrimination, as if a person guilty of violating one federal law were somehow thereby entitled to a retrial of all his or her other violations of federal law. As it stands, the court's order represents nothing more than the en banc court's own speculation as to what the jury was thinking. Such an analysis is completely at odds with every known principle of review of jury verdicts.

The en banc court did not cite, and petitioner cannot find, any authority which would permit the vacating of a jury verdict on these grounds. It is the en banc court's order of a new trial which is truly iconoclastic. The jury's verdict must be upheld unless there is "a complete absence of probative facts to support the conclusion reached." *Lavender v. Kurn,* 327 U.S. 645, 653 (1946). A court cannot grant a new trial because it believes a different finding is more appropriate, based on the court's own interpretation of the facts. *See, e.g., Olefins Trading, Inc. v. Han Yang Chem Corp.*, 9 F.3d 282 (3rd Cir. 1993). It follows that a court, even a trial court, cannot speculate that a jury verdict was based on pension evidence where there was sufficient evidence of age discriminnation to support it. While an appellate court may inquire into the sufficiency of the evidence, it cannot itself assess whether the facts

establish the case. *See Boyle v. United Technologies Corp.*, 487 U.S. 500, 514 (1988) ("whether the facts establish the conditions for the defense is a question for the jury").

The en banc court's order might make some sense if it concerned a question of the proper admissibility of the pension related evidence. But the admissibility of the pension evidence was never questioned from the trial through the appeals. In this sense, the en banc court's decision could be read as implying that a pension interference and an age discrimination case should never be tried together. That implication is in direct conflict with this Court's finding in this very case that there can be dual liability under ERISA and the ADEA. *Hazen Paper Co.* slip op. at 8, 113 S. Ct. at 1707. This Court did not suggest that there was any reason why such claims could not be tried together, let alone create a rule prohibiting it. Given this Court's opinion, no one could claim that the jury's answers in this case were inconsistent, although one might read that implication into the en banc court's order. The court is obligated to make the answers consistent and harmonize them if at all possible. *Gallick v. Baltimore & O. R. R.*, 372 U.S. 108, 119 (1963); *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355 (1962); *Toucet v. Maritime Overseas Corp.*, 991 F.2d 5 (lst Cir. 1993). Since the respondent could have terminated the petitioner because of his age *and* at such a time as to interfere with his pension, there is no inconsistency here.

A court must resolve disputed questions of fact on a *general* verdict in favor of the prevailing party, *Texaco, Inc. v. Hasbrouck*, 496 U.S. 543, 547 (1990). It follows that a court cannot ignore a jury's answer to a *special* verdict question which specifically finds *age* discrimination. (C.A. App. 1122). Here the jury specifically found *age* discrimination in answer to one question and *pension* interference in answer to a separate question (C.A. App. 1123) and assessed wholly separate damages for each finding, based on the jury instructions which kept the two matters entirely separate. There is no basis for the en banc court's assumption that the jury's

perfectly rational, specific and consistent answers are irrational and inconsistent.

Finally, one might argue that the en banc court implied that the jury either was not instructed properly or ignored its instructions. There was no challenge to the instructions. Indeed the jury was instructed that it could find for the petitioner on his ADEA claim only if it found that "age must have been the determining factor" in his termination (C. A. App. 1086). That being the case, the en banc court, therefore, assumed that the jury disregarded the trial court's instructions. This, of course, an appellate court cannot do. Rather, it must assume that the jury followed its instructions. *Abney v. United States,* 431 U.S. 651, 665 (1977); *Rogers v. Missouri Pac. R. R.,* 352 U.S. 500, 505 (1957); *Shotwell v. United States,* 371 U.S. 341, 346 (1963); *Fairmount Glass Works v. Cub Fork Coal Co.,* 287 U.S. 474(1933).

The Circuit Court offered no acceptable rationale for its order because none exists. Appellate judges have no right to overturn jury verdicts based upon their suspicions. The en banc court has done precisely what the Seventh Amendment forbids: it has reexamined a jury verdict on the basis of its own version of the facts. It has acted on its belief that the jury's reasons were wrong. An appellate court cannot inquire whether the jury's reasons were right or wrong. *Union Pac. R.R. v. Hadley,* 246 U.S. 330, 334 (1918).

E. There Is No Substantive Basis for the En Banc Court's Finding of a "Likelihood" of Verdict Contamination.

Even if the Circuit Court had the power to independently reexamine a jury verdict, no basis for reaching a conclusion of contamination can be found in the record.

In order to conclude "verdict contamination" the en banc court presumably would have had to rely on the evidence presented or

the court's instructions to the jury. Neither of these, however, would reasonably lead to a conclusion that there was a likelihood that the jury confused the pension and age discrimination issues.

As noted above, the court's instructions to the jury did not in any way suggest that Mr. Biggins' pension status was relevant to the age discrimination claim. Only age was discussed. There were separate instructions on the age and pension counts and no reference of one to the other in either instruction. If the whole case were tried again, the instructions would not be any different.

Nor was there anything about the presentation of the evidence which would create a likelihood that the jury was relying on the pension evidence in finding age discrimination. The pension evidence was a very small portion of the trial and concerned only the question of vesting based on years of service and not on age per se. (C.A. App. 379-381, 504-505, 957-962).

With the evidence and the instructions in this posture, it is hardly likely that the jury would have allowed its determination of the Hazens' culpability on the pension issue to affect its deliberations on the age discrimination count, especially when there were *separate* questions, *separate* responses and *separate* damages for each count. How then can the court conclude there was a "likelihood" the jury took negative account of the pension interference in finding age discrimination except on the basis of pure speculation. The jury cannot speculate, nor should the Circuit Court. The verdict was consistent with the charge and the evidence. The jury found dual liability just as this Court has stated it was permitted to do. *Hazen Paper*, slip op. at 8, 113 S. Ct. at 1707.

The en banc court's failure to adhere to the established standards for the review of jury verdicts in discrimination cases has great importance now that Congress, under the Civil Rights Act of 1991, 42 U.S.C. § 1981 (a), has provided for a right to trial by jury in all these cases. As this Court has held repeatedly, questions of

fact in discrimination cases are not to be treated any differently than other ultimate questions of fact. *See St. Mary's Honor Center,*, slip op. at 22, 113 S. Ct. at 2756.

If permitted to stand, the en banc court's order treats discrimination cases very differently indeed and effectively abrogates a party's right to trial by jury. By acting as it did on the issue of a new trial, and issuing the order it did, the en banc court violated the Seventh Amendment rights of the petitioner and both the letter and the spirit of the mandate of this Court. Petitioner, therefore, requests that this Court either grant a writ of certiorari and reverse the decision of the en banc court and enter judgment for the petitioner for the reasons stated herein, or issue a writ of mandamus to the en banc First Circuit Court of Appeals to vacate its order of a new trial and to comply with the mandate

II.

THE CIRCUIT COURT ORDER VIOLATED THE MANDATE OF THIS COURT.

A. A Writ of Mandamus Should Issue to Order the Circuit Court to Comply with the Mandate.

Petitioner seeks a Writ of Mandamus to the First Circuit Court of Appeals on grounds that the en banc court failed to comply with the mandate of this Court in *Hazen Paper Co. v. Biggins,* slip op. at 9, 113 S. Ct. 1708. As noted above, the original petition for certiorari in this case sought review only of the Circuit Court's affirmation of the denial of the judgment notwithstanding the verdict. In ruling on that matter, this court ordered as follows:

> We therefore remand this case for the Court of Appeals to reconsider whether the jury had sufficient evidence to find an ADEA violation.

Hazen Paper Co., slip op. at 9, 113 S. Ct. at 1708.

Reconsideration of the sufficiency of the evidence was the only issue properly remaining in the case. The Circuit Court of Appeals' panel adhered to the mandate and reconsidered the sufficiency of the evidence in light of this Court's opinion in this case and its subsequent opinion in *St. Mary's Honor Center v. Hicks*, No. 92-602, slip op., 113 S. Ct. 2742 (1993). In doing so the panel found sufficient evidence. (Pet. App. 26).

The en banc court, however, never acted within or on the basis of the mandate of this Court. Instead of reconsidering the sufficiency of the evidence, it speculated as to the jury's behavior and ordered a new trial on a basis which had nothing to do with sufficiency of the evidence or a judgment notwithstanding the verdict. The en banc court did not find the evidence insufficient, and it did not question the panel's opinion. Instead it wiped out the jury's verdict and almost seven years of trial and appellate litigation on the basis of an issue which, if it could ever have been raised, could only have been raised before the trial court, and which was certainly no longer before the court.

A lower court is "bound to carry the mandate of [an] upper court into execution and could not consider the questions which the mandate laid at rest." *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 167 (1939) (the mandate is conclusive as to matters actually decided and matters decided by necessary implication). The issues presented by the respondents in the original petition for certiorari in this Court did not include the appropriateness of the trial court's denial of a new trial. Certiorari was granted on two issues stemming from the motion for judgment notwithstanding the verdict. This Court then remanded the case for a determination of the sufficiency of the evidence. That issue was easily resolvable, especially in light of this Court's opinion in St. *Mary's Honor Center v. Hicks* (*see* argument below at 28-29). The en banc court, however, did not reconsider the sufficiency of the evidence. Their order showed no consideration of the issue at all.

Where a Court of Appeals has thus disobeyed the mandate of this Court, the appropriate remedy lies in a writ of mandamus. As this Court has stated:

> When a case has been once decided by this court on appeal, and remanded to the Circuit Court . . . [that court] is bound by the decree as the law of the case; and must carry it into execution according to the mandate. . . . If the Circuit Court mistakes or misconstrues the decree of this court, and does not give full effect to the mandate, its action may be controlled, either upon a new appeal . . . or by a writ of mandamus to execute the mandate of this court.

Vendo Co. v. Lektro-Vend Corp., 434 U.S. 425, 427-428 (1978), *quoting In Re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895), *accord United States v. Fossott*, 20 U.S. (1 How.) 445, 446 (1858).

This comports with decades of Supreme Court authority, that an inferior court has no power or authority to deviate from the mandate issued by an appellate court. *Briggs v. Pennsylvania R. R.*, 334 U.S. 304 (1948). *See also Sibbald v. United States*, 37 U.S. (12 Pet.) 488, 492 (1838); *Texas & Pac. Ry. v. Anderson*, 149 U.S. 237 (1893); *In re Potts*, 166 U.S. 263, 266 (1897) (no authority to grant a new trial); *Gaines v. Caldwell*, 148 U.S. 228 (1893) (lower court could not order taking of new evidence); *Will v. United States*, 389 U.S. 90, 95-96 (1967) (mandamus will be to confine a lower court to the terms of an appellate court mandate); *General Atomic Company v. Felter*, 436 U.S. 493 (1978) (state court could not do what Supreme Court held it had no power to do); *cf. United States v. Smith*, 331 U.S. 469 (1947) (lower court could not grant criminal defendant a new trial simply "in the interests of justice" where Supreme Court mandate did not authorize a new trial).

The situation here is similar to *Deen v. Hickman,* 358 U.S. 57 (1958), *cert. denied sub nom. Deen v. Gulf, Colorado & Santa Fe Ry. Co.,* 358 U.S. 874 (1958). There, this Court had previously ruled that a plaintiff had presented sufficient evidence of negligence to support a jury verdict. *Deen v. Gulf, Colorado & Santa Fe Ry. Co.,* 353 U.S. 925 (1957). After remand, the Texas Supreme Court further remanded the case to the Texas Court of Civil Appeals[6] to evaluate whether there were grounds for a new trial. *Deen v. Hickman* at 57-58. This Court held on a request for mandamus that the determination of the new trial issue had been foreclosed by its earlier decision, and that the Texas Supreme Court had to conform to the mandate and could not permit even consideration of a new trial at the lower level. *Deen v. Hickman,* 358 U.S. at 58.

The Court of Appeals did not limit itself here to the points specifically consigned to it by this Court. Had the en banc court done so, it would have been compelled to find in favor of the petitioner as did the Circuit Court panel.

B. Petitioner Presented Sufficient Evidence By the Standards of This Court's Opinions In This Case and *St. Mary's Honor Center v. Hicks.*

In the present case, the jury made a finding of discrimination. There is no dispute but that petitioner presented a prima facie case and that the jury rejected the employer's proffered reason. This Court in its prior opinion accepted that the plaintiff successfully rebutted the Hazens' explanation. *Hazen Paper Co.,* slip op. at 9, 113 S. Ct. at 1708. In its second opinion, the First Circuit panel explicitly stated that pretext had been found. (Pet. App. 24a). But

6. Under a specific provision of the Texas state constitution, the Texas Court of Civil Appeals was permitted to grant new trials on the same grounds as a trial court, a power that did not rest with the Texas Supreme Court. *Gulf, Colorado and Santa Fe Railway Company v. Deen,* 158 Tex. 466, 471, 312 S.W.2d 933, 937 (1958).

that court went further and concluded that the petitioner had also shown additional evidence from which the jury could infer age discrimination, thereby making clear that the petitioner could prevail even under the First Circuit's "pretext plus" approach. The en banc court did not disagree that there was sufficient evidence and ordered a new trial in spite of the sufficiency of the evidence.

The First Circuit has, alone among all of the circuits, been reluctant to accept and follow the holding in *St. Mary's Honor Center.*[7] In *Woods v. Friction Materials, Inc.*, 30 F.3d 255, 1994 WL 387054, 65 Fair Empl. Prac. Cas. (BNA) 1109 (lst Cir. 1994), the court stated that the above cited holding in *St. Mary's Honor Center* is only meant to apply to some cases:

> . . . this quoted statement simply makes clear that the Supreme Court envisioned that some cases exist where a prima facie case and the disbelief of a pretext could provide a strong enough inference of actual discrimination to permit the fact finder to find for the plaintiff. Conversely, we do not think that the Supreme Court meant to say that such a finding would always be permissible. . . . The strength of the

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7. Since *St. Mary's Honor Center v. Hicks,* every circuit which has considered the issue has held that under *St. Mary's Honor Center,* if a plaintiff presents a prima facie case and evidence from which the jury could conclude that the employer's proferred reason is false or a pretext, then there is sufficient evidence for a jury to decide whether or not there was discrimination. *DeMarco v. Holy Cross High School,* 4 F.3d 166, 170 (2nd Cir. 1993); *Armbruster v. Unisys Corp.*, __ F.3d __, 1994 WL 394670, 65 Fair Empl. Prac. Cas. (BNA) 838 (3rd Cir. 1994); *Roush v. KFC Nat'l Management Co.,* 10 P.3d 392, 396 (6th Cir. 1993); *Anderson v. Baxter Healthcare Corp.*, 13 F.3d 1120, 1123 (7th Cir. 1994); *Washington v. Garrett,* 10 F.3d 1421,1433 (9th Cir. 1993); *and see Hairston v. Gainesville Sun Co.*, 9 F.3d 913, 921 (11th Cir. 1993), *rehearing and rehearing en banc denied,*6 F.3d 1233, (11th Cir. 1994) (follows the cited principle of *St. Mary's Honor Center* without discussion of the case).

> prima facie case and the significance of the disbelieved pretext will vary from case to case depending upon the circumstances. In short, everything depends upon the individual facts.

Woods v. Friction Materials, Inc., 30 F.3d at __, 1994 WL 387054, 65 Fair Empl. Prac. Cas. (BNA) at __.

In other words, the First Circuit is treating *St. Mary's Honor Center* as an option whose language it will follow "depending on the circumstances" and the "individual facts." The First Circuit's language is telling: it [the court] will determine the "strength" of the prima facie case evidence and the "significance" of the pretext evidence, that is, the court will weigh the evidence to decide its "strength" and "significance" before it allows the jury to do so. Everything the court says "depends on the individual facts." The facts in this analysis are being determined by the court and not the jury. Such an approach cannot be squared with the Seventh Amendment, the right to trial by jury or this Court's holding in *St. Mary's Honor Center.* By its action in this case and by its opinion in subsequent cases, the First Circuit Court of Appeals has made clear that one way or another it will not follow the principles of this Court as stated in *St. Mary's Honor Center v. Hicks* as to the standard for sufficiency of the evidence in discrimination cases. This deprives discrimination victims in the First Circuit of their constitutional and statutory right to trial by jury. Both of these issues are of particular importance now that all employment discrimination cases are subject to jury trial under the Civil Rights Act of 1991, 42 U.S.C. § 1981(a).

In order to comply with the mandate of this Court, the First Circuit, if it had analyzed the sufficiency of the evidence, would have had to have concluded, as the panel opinion did, that the petitioner presented sufficient evidence. Compliance with the mandate, therefore, dictates a judgment in favor of the petitioner.

Should this Court decide that mandamus is not appropriate, it should grant certiorari and affirm the judgment in favor of the petitioner who has presented sufficient evidence and obtained a jury finding of discrimination.

CONCLUSION

For all the foregoing reasons, petitioner respectfully requests that a writ of mandamus issue to the United States Court of Appeals for the First Circuit directing the entry of judgment for the petitioner, or, in the alternative, that this writ of certiorari be granted, the order of the en banc court vacated and the October 18, 1993, order of the panel of the First Circuit reinstated.

Respectfully submitted

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APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DATED AUGUST 10, 1994

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 91-1591

WALTER F. BIGGINS,

Plaintiff-Appellee,

v.

THE HAZEN PAPER COMPANY, ET AL.,

Defendants-Appellants.

No. 91-1614

WALTER F. BIGGINS,

Plaintiff-Appellant,

v.

THE HAZEN PAPER COMPANY, ET AL.,

Defendants-Appellees.

BEFORE

TORRUELLA, Chief Judge,
BOWNES, Senior Circuit Judge,
SELYA, CYR, BOUDIN AND STAHL, Circuit Judges.

Appendix A

ORDER OF COURT

Entered: August 10, 1994

Upon consideration of plaintiff-appellee's petition for rehearing,

It is ordered that said petition be denied.

By the Court:
s/ FRANCIS P. SCIGLIANO
Clerk

[cc: Messrs. Harrington and Egan]

APPENDIX B — ORDERS OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DATED JUNE 27, 1994

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 91-1591

WALTER F. BIGGINS,

Plaintiff-Appellee,

v.

THE HAZEN PAPER COMPANY, ET AL.,

Defendants-Appellants.

No. 91-1614

WALTER F. BIGGINS,

Plaintiff-Appellant,

v.

THE HAZEN PAPER COMPANY, ET AL.,

Defendants-Appellees.

ORDER OF COURT

Entered: June 27, 1994

Appendix B

The order of the en banc court of June 27, 1994 having withdrawn the panel opinion, this court's judgment of October 18, 1993 is vacated.

The judgment of this court is now entered in accordance with this court's panel order of June 27, 1994 and in accordance with the en banc order of June 27, 1994.

By the Court:
s/ FRANCIS P. SCIGLIANO
Clerk

[cc: Messrs. Harrington and Egan]

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 91-1591

Walter F. Biggins,

Plaintiff, Appellee,

v.

The Hazen Paper Company, et al.,

Defendants, Appellants.

No. 91-1614

Walter F. Biggins,

Plaintiff, Appellant,

v.

The Hazen Paper Company, et al.,

Defendants, Appellees.

BEFORE
Torruella, *Circuit Judge*,
Bownes, *Senior Circuit Judge*,
and Tauro*, *District Judge*.

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* Of the District of Massachusetts, sitting by designation.

Appendix B

PANEL ORDER

Entered June 27, 1994

Pursuant to the direction of the *En Banc* Court we issue the following order:

1. The finding of liability on the ERISA count is affirmed. A remittitur of $7,000 on the damages award of $100,000 is to be made.

2. The finding of liability on the wrongful discharge count and the award of one dollar in damages are affirmed.

3. The finding of liability on the fraud count and the damages award of $315,098 are affirmed.

4. The finding of liability on the breach of employment contract count is reversed. The damages award on that count of $266,987 is annulled.

5. We affirm the district court's grant of j.n.o.v. on the Massachusetts Civil Rights Act count. This means the jury award of one dollar in damages on that count is annulled.

6. The awards of prejudgment interest on the ERISA count and the wrongful discharge and fraud counts are affirmed.

7. The district court's refusal to enhance plaintiff's attorney's fees is affirmed.

8. Plaintiff filed fee applications in September and November of 1993. It separates the fees requested into five segments. The first

part is entitled: "Hours Expended Since Last Appellate Fee Application and Prior to Certiorari Petition to United States Supreme Court." The time expended runs from February 2, 1992, to March 24, 1992. The total fees requested amount to $16,293.50. On March 19, 1992, we awarded plaintiff $71,798.50 in appellate attorney's fees for the first appeal. This appeal involved a number of issues: three under the ADEA claim; the ERISA claim: four under the Massachusetts law claims; prejudgment interest; and attorney's fees. At the time we made our award we felt that it covered the time for the entire appeal. We do not think that plaintiff is entitled to any additional fees for the first appeal. We deny the request for additional fees in the amount of $16,293.50. The balance of the application has been rendered moot by the order of the *En Banc* Court.

By the Court:
s/ Francis P. Scigliano
Clerk.

[cc: Messrs. Harrington, Gordon, Hayes, McGinley, Randall, Egan and Cahillane]

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 91-1591

WALTER F. BIGGINS,

Plaintiff-Appellee,

v.

THE HAZEN PAPER COMPANY, ET AL.,

Defendants-Appellants.

No. 91-1614

WALTER F. BIGGINS,

Plaintiff-Appellant,

v.

THE HAZEN PAPER COMPANY, ET AL.,

Defendants-Appellees.

BEFORE

TORRUELLA, SELYA, CYR, BOUDIN, AND STAHL, Circuit Judges.*

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* Chief Judge Breyer did not participate in the issuance of this order.

Appendix B

ORDER OF THE EN BANC COURT

Entered: June 27, 1994

The petition for rehearing en banc suggests that we rehear this case only with respect to plaintiff's age discrimination claim. After examining the record, the en banc court became concerned that the jury may well have taken negative account of the defendants' ostensible desire to deprive the plaintiff of a pension — a factor that the Supreme Court outlawed as a basis for the ADEA verdict, *see Hazen Paper Co. v. Biggins,* 113 S. Ct. 1701, 1706-07 (1993). Consequently, the en banc court, pursuant to Fed. R. App. P. 35(a) & (b), directed that the parties show cause why the panel's opinion following remand, issued on October 18, 1993, should not be withdrawn, the panel holding numbered 1 (*see* Panel Op. at 12) vacated, a separate order entered to implement the panel holdings numbered 2 through 8 (*see* Panel Op. at 12-13), the judgment on the ADEA count vacated, and that count remanded for a full new trial.

The show-cause order issued on March 1, 1994. The court has now reviewed the memoranda filed by the parties in response to this show-cause order and has concluded that the likelihood of verdict contamination with respect to the count at issue is sufficiently great that the interests of justice require a full new trial on the age discrimination claim. Consequently, we hereby withdraw the panel opinion, vacate the judgment of this court pending reissuance of a revised panel opinion (*see infra*), vacate holding numbered 1 (*see* Panel Op. at 12) and that portion of holding numbered 7 that relates to prejudgment interest vis-a-vis the ADEA count (*see* Panel Op. at 13), remand the ADEA count for a full new trial, and direct the district court to vacate the judgment on the ADEA count, entered on April 12, 1991. Furthermore, we

direct the panel to reissue the remainder of its opinion (which the panel may elect to do by means of a summary order), the revised panel opinion to be filed on the same day as, but immediately after, this order. The panel also shall take whatever other action may be necessary or desirable to effectuate the remaining holdings therein contained.

We have considered and rejected plaintiff's request that, in respect to the ADEA count, we order a new trial limited to particular elements of liability. Furthermore, we deny plaintiff's contingent request that we also order a retrial of the wrongful discharge and fraud counts. We do not have jurisdiction over those claims (a) because no en banc review of them was sought in a timely fashion, and (b) more fundamentally, because, although plaintiff prosecuted a cross-appeal, he did not direct his notice of appeal to that part of the district court's judgment. *See* Fed.R.App.P. 3(c) (requiring, *inter alia,* that a notice of appeal "designate the judgment, order or part thereof appealed from"); *see also Smith v. Barry,* 112 S.Ct. 678, 682 (1992) ("Rule 3's dictates are jurisdictional in nature, and their satisfaction is a prerequisite to appellate review"); *Kotler v. American Tobacco Co.*, 981 F.2d 7, 10-11 (lst Cir. 1992) (similar).

The plaintiff's reliance on the Advisory Committee's comment following Rule 3 — to the effect that courts should "dispense with literal compliance in cases in which it cannot fairly be exacted" — is misplaced. This comment has been understood by the Supreme Court as only a narrowly limited directive to excuse "informality of form or title" in a notice of appeal, or other such "imperfect but substantial compliance with a technical requirement." *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 315 (1988). Thus, while it is true that "[n]oncompliance with 'mere technicalities' will not defeat appellate jurisdiction", *Kotler,* 981

F.2d at 11 (citation omitted), this principle only reigns when the litigant's action, though somehow defective, "is the functional equivalent of what the rule requires." *Torres*, 487 U.S. at 317.

The plaintiff's actions here, however, simply cannot be construed as effecting substantial compliance. The failure to take an appeal from the judgment vis-a-vis the wrongful discharge and fraud counts constitutes neither noncompliance with a mere technicality nor the functional equivalent of indicating an intention to appeal from the district court's disposition of those counts.

Nor is this a case in which, despite plaintiff's failure to designate the specific portions of the judgment for appeal, the paper that plaintiff did file provided adequate notice, in light of all the circumstances, of an intention to appeal anent the wrongful discharge and fraud counts. *Cf., e.g., Foman v. Davis,* 371 U.S. 178, 181 (1962) (holding that where plaintiff's first notice of appeal properly identified the judgment to be appealed, but was filed prematurely, plaintiff's second notice of appeal, which failed to designate the same judgment, was nonetheless effective).

Quite the opposite obtains in this situation: though plaintiff did file a cross-appeal, he limited it, by designation, to three of the district court's numbered holdings, none of which had anything to do with the wrongful discharge and fraud counts.

Because plaintiff's notice of appeal could not reasonably be interpreted as giving notice that plaintiff was appealing any of the other numbered holdings (including those which encompass the disposition of the claims for wrongful discharge and fraud), the defendants "were entitled to rely on the plain language and apparent purport of the notice [plaintiff] prepared and served." *Kotler,* 981 F.2d at 11; *see also Smith,* 112 S.Ct. at 682 (declaiming

that "the notice afforded by a document, not the litigant's motivation in filing it, determines the document's sufficiency as a notice of appeal"). This reliance was all the more warranted since plaintiff's notice of appeal directed the defendants' attention to other specific rulings of the court below, (namely, numbered holdings 6, 7, and 9), but not to the wrongful discharge and fraud claims. Given this fact, straining to find adequate notice regarding the latter claims would involve not merely a liberal reading of Rule 3, but would require waiving the rule's jurisdictional requirements. No matter how the equities fall, we cannot take so iconoclastic a course. *See Torres*, 487 U.S. at 317.

By the Court:
s/ Francis P. Scigliano
Clerk

[cc: Messrs. Harrington and Egan]

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DATED MARCH 1, 1994

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 91-1591

WALTER F. BIGGINS,

Plaintiff-Appellee,

v.

THE HAZEN PAPER COMPANY, ET AL.,

Defendants-Appellants.

No. 91-1614

WALTER F. BIGGINS,

Plaintiff-Appellant,

v.

THE HAZEN PAPER COMPANY, ET AL.,

Defendants-Appellees.

BEFORE

BREYER, Chief Judge,
BOWNES, Senior Circuit Judge,
TORRUELLA, SELYA, CYR, BOUDIN AND STAHL, Circuit Judges.

Appendix C

ORDER OF COURT

Entered: March 1, 1994

The petition for rehearing en banc suggests that we rehear this case only with respect to plaintiff's age discrimination claim. Having examined the record, the en banc court is concerned whether the likelihood that the jury took negative account of the defendants' ostensible desire to deprive the plaintiff of a pension — a factor that the Supreme Court outlawed as a *basis* for the ADEA verdict, *see Hazen Paper Co. v. Biggins*, 113 S. Ct. 1701, 1705-07 (1993) — is sufficiently great that the interests of justice require a new trial on the age discrimination claim.

Consequently, the en banc court, pursuant to Fed. R. App. P. 35(a), (b), directs that the parties, within two weeks from the date of this order, show cause, if any there be, why the panel's opinion following remand, issued on October 18, 1993, should not be withdrawn, the panel holding numbered 1 (*see* Panel Op. at 12) vacated, a separate order entered to implement the panel holdings numbered 2 through 8 (*see* Panel Op. at 12-13), the judgment on the ADEA count vacated, and that count remanded for a full new trial.

Memoranda filed by the parties in response to this show-cause order shall be in the usual form and shall be limited to 10 pages per side.

By the Court:
Francis P. Scigliano
Clerk

[cc: Messrs. Harrington and Egan]

APPENDIX D — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DATED OCTOBER 18, 1993

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 91-1591

WALTER F. BIGGINS,

Plaintiff, Appellee,

v.

THE HAZEN PAPER COMPANY, ET AL.,

Defendants, Appellants.

No. 91-1614

WALTER F. BIGGINS,

Plaintiff, Appellant,

v.

THE HAZEN PAPER COMPANY, ET AL.,

Defendants, Appellees.

ON REMAND FROM THE UNITED STATES
SUPREME COURT

Appendix D

Before
Torruella, *Circuit Judge,*
Bownes, *Senior Circuit Judge*
and Tauro,* *District Judge.*

John M. Harrington, Jr. with whom *Robert B. Gordon, Ropes & Gray, Richard S. Hayes, Patrick W. McGinley, Raymond R. Randall* and *Sullivan & Hayes* were on brief for Hazen Paper Company, et al.

John T. Egan with whom *Maurice M. Cahillane* and *Egan, Flanagan and Cohen, P.C.* were on brief for Walter F. Biggins.

October 18, 1993

BOWNES, *Senior Circuit Judge.* The Supreme Court has remanded this case to us "to reconsider whether the jury had sufficient evidence to find an ADEA violation." *Hazen Paper Co. v. Biggins,* 113 S. Ct. 1701, 1708 (1993). In order to properly assay the evidentiary record in this case, we must first examine the Court's opinion. The issue triggering the remand was "does an employer's interference with the vesting of pension benefits violate the ADEA?" *Id.* at 1705. The Court held that it did not.[1]

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* Of the District of Massachusetts, sitting by designation

1. The Court also considered a second question:

> does the *Thurston* standard for liquidated damages apply to the case where the predicate ADEA violation is not a formal, facially discriminatory policy, as in *Thurston,* but rather an informal decision by the employer that was motivated by the employee's age?

Id. at 1705. It ruled that the *Thurston* standard did so apply and affirmed our holding to that effect. The *Thurston* issue is no longer a factor in the case.

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In addition to finding ADEA liability, the jury also found that the defendants had violated ERISA by firing plaintiff in order to prevent his pension benefits from vesting. Although this finding was not before the court, it is referred to in the Court's opinion. The Court noted that we had found the evidence of pension interference sufficient for ERISA liability, and that we "also gave it considerable emphasis in upholding ADEA liability." *Id.* at 1707. It then quoted from our opinion:

> Based on the foregoing evidence, the jury could reasonably have found that Thomas Hazen decided to fire Biggins before his pension rights vested and used the confidentiality agreement as a means to that end. The jury could also have reasonably found that age was inextricably intertwined with the decision to fire Biggins. If it were not for Biggins' age, sixty-two, his pension rights would not have been within a hairbreadth of vesting. Biggins was fifty-two years old when he was hired; his pension rights vested in ten years.

Biggins v. Hazen Paper Co., 953 F.2d 1405, 1412 (1st Cir. 1992), *quoted in Hazen Paper*, 113 S. Ct. at 1704-05.

After distinguishing between "disparate treatment" and "disparate impact" theories of employment discrimination, the court discussed the legislative history and purpose of the ADEA statute and the pertinent case law. It then held "that an employer does not violate the ADEA just by interfering with an older employee's pension benefits that would have vested by virtue of the employee's years of service." *Hazen Paper*, 113 S. Ct. at 1707-08. Following this holding the Court said:

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Besides the evidence of pension interference, the Court of Appeals cited some additional evidentiary support for ADEA liability. Although there was no direct evidence of petitioners' motivation, except for two isolated comments by the Hazens, the Court of Appeals did note the following indirect evidence: Respondent was asked to sign a confidentiality agreement, even though no other employee had been required to do so, and his replacement was a younger man who was given a less onerous agreement. 953 F.2d at 1411. In the ordinary ADEA case, indirect evidence of this kind may well suffice to support liability if the plaintiff also shows that the employer's explanation for its decision—here, that respondent had been disloyal to Hazen Paper by doing business with its competitors—is " 'unworthy of credence.' " *Aikens,* 460 U.S., at 716, 103 S. Ct., at 1482 (quoting *Burdine,* 450 U.S., at 256, 101 S. Ct., at 1095). But inferring age-motivation from the implausibility of the employer's explanation may be problematic in cases where other unsavory motives, such as pension interference, were present. This issue is now before us in the Title VII context, see *Hicks v. St. Mary's Honor Center,* 970 F.2d 487 (CA8 1992), cert. granted, 506 U.S. __, 113 S.Ct. 954, 122 L.Ed.2d 111 (1993), and we will not address it prematurely. We therefore remand the case for the Court of Appeals to reconsider whether the jury had sufficient evidence to find an ADEA violation.

Id. at 1708.

The decision in *St. Mary's Honor Center v. Hicks,* 113 S. Ct. 2742 (1993) followed hard on the heels of *Hazen Paper,* and that opinion forms part of the lens through which we must view the evidence "to reconsider whether the jury had sufficient evidence to find an ADEA violation." *Hazen Paper,* 113 S. Ct. at 1708.

St. Mary's involved a charge by an employee that his employer had demoted and then discharged him because of his race in violation of Title VII. After a bench trial, the judge found that the reasons given by the employer for its decisions were not its real reasons. Nonetheless, the court determined that the plaintiff/employee had not carried his burden of proving that race was a determinative factor underlying his employer's actions, and that the adverse employment decisions were not racially motivated, but based on personal animosity. On appeal the Eighth Circuit reversed, holding that where the trier of fact rejects an employer's proffered explanation, the court *must* enter judgment for the plaintiff. The Supreme Court confronted this issue and reversed.

In explaining its decisions the Court stated, *inter alia:*

> The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination.[4] Thus, rejection of the defendant's proffered reasons, will *permit* the trier of fact to infer the ultimate fact of intentional discrimination, and the Court of Appeals was correct when it noted that, upon

> such rejection, "[n]o additional proof of discrimination is *required,*" 970 F.2d, at 493 (emphasis added). But the Court of Appeals' holding that rejection of the defendant's proffered reasons *compels* judgment for the plaintiff disregards the fundamental principle of Rule 301 that a presumption does not shift the burden of proof, and ignores our repeated admonition that the Title VII plaintiff at all times bears the "ultimate burden of persuasion."

St. Mary's, 113 S. Ct. at 2749 (emphasis in original).

Footnote 4 states:

> 4. Contrary to the dissent's confusion-producing analysis, *post,* 2761-2762, there is nothing whatever inconsistent between this statement and our later statements that (1) the plaintiff must show "*both* that the reason was false, *and* that discrimination was the real reason," *infra,* at 2752, and (2) "it is not enough . . . to *dis*believe the employer," *infra,* at 2754. Even though (as we say here) rejection of the defendant's proffered reasons is enough at law to *sustain* a finding a discrimination, *there must be a finding of discrimination.*

(Emphasis in original.)

We now turn to an analysis of the evidence to determine whether, absent the evidence of the employer's interference with

plaintiff's pension vesting, there was sufficient evidence for the jury to find age discrimination.

In disparate-treatment employment discrimination cases, courts follow the burden-shifting order of proof framework established in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973) and reaffirmed in *Texas Dept. of Community Affiars v. Burdine,* 450 U.S. 248 (1981).

Under the *McDonnell Douglas* approach a plaintiff must first establish, by a preponderance of the evidence, a "prima facie" case of age discrimination. An ADEA plaintiff can make out a prima facie case by showing that he was a member of the protected group (*i.e.,* that he was over the age of 40); that his work product was satisfactory; and that he was discharged and replaced by someone with comparable qualifications. *Medina-Munoz v. R.J. Reynolds Tobacco Co.,* 896 F.2d 5, 8 (1st Cir. 1990) (citing cases). A prima facie case raises a presumption of discrimination which, if not rebutted, will result in the entry of judgment for the plaintiff.

Once the plaintiff has made out the elements of a prima facie case, his employer must produce an explanation to rebut the presumption of discrimination raised by the prima facie case. *St. Mary's,* 113 S. Ct. at 2747. To do this the employer must come forward with evidence that its decision was made "for a legitimate, nondiscriminatory reason." *Burdine,* 450 U.S. at 254.

After the employer has articulated one or more legitimate, nondiscriminatory reasons for its actions, the shifted burden of production becomes "irrelevant" and " 'the presumption raised by the prima facie case is rebutted', and 'drops from the case.' ". *St. Mary's,* 113 S. Ct. at 2747 (quoting *Burdine,* 450 U.S. at 255 & n. 10).

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At this point the burden shifts back to the plaintiff to demonstrate that his employer's proffered reasons were a pretext for age discrimination. *Id.*

There can be no question that plaintiff established a prima facie case with the following evidence:

> (i.) he was 62;
> (ii.) he met his employer's performance expectations;
> (iii.) he was discharged; and
> (iv.) he was replaced by another individual of similar skills and qualifications, thus confirming the defendants' continuing need for equivalent services.

See id. at 2746-47; *Vega v. Kodak Caribbean, Ltd.*, No. 93-1156, slip op. at 4 (1st Cir. Aug. 24, 1993); *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1013 (1st Cir. 1979). This created the presumption that "the employer unlawfully discriminated against the employee." *Burdine*, 45 U.S. at 254. The employer here—Hazen Paper—introduced evidence that the reason for plaintiff's discharge was that he had entered into two businesses with his son which involved a great risk that plaintiff would disclose company secrets to its competitors. The owners of Hazen Paper, Thomas and Robert Hazen, felt that plaintiff was not a loyal employee. There was also evidence of a continuing dispute between plaintiff and his employer over pay. Plaintiff felt that he was grossly underpaid and made repeated requests for an increase in pay. He testified that in July of 1984, Hazen Paper, through Thomas Hazen, promised to make up the difference between plaintiff's salary of $44,000 and the $100,000 plaintiff wanted by giving him stock in the company. Thomas Hazen emphatically denied making such a promise.

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The jury rejected the company's rebuttal evidence. It found on the ERISA claim that plaintiff was discharged with the specific intent of interfering with his pension vesting. The jury also found on the state law claim of wrongful discharge that the company had agreed to compensate plaintiff with shares of its stock and that it wrongfully discharged plaintiff in order to deprive him of the promised stock. The jury further found that this constituted common law fraud under the Massachusetts law.

Our review of the record has not resulted in finding any more evidence on age discrimination than originally pointed out in our original opinion. We do, however, now flesh it out.

The plaintiff, Walter Biggins, at age sixty-two, was replaced by a man at least twenty years younger. Biggins' testimony at Volume I, page 152 of the record is that he was replaced by a man in his late thirties or early forties.

The confidentiality agreement of plaintiff's replacement provided more favorable severance and non-competition terms than were offered to plaintiff. *See* T. Hazen's Testimony at Vol. IV, p. 92; Plaintiff's Ex. 10 (Biggins' Agt.); Plaintiff's Ex. 25 (Replacement's Agt.). This evidence was beyond cavil.

The three younger employees in plaintiff's department, all in their thirties, were never asked to sign confidentiality agreements. *See* Biggins' Testimony at Vol. I, pp. 121-23.

We have omitted from consideration two comments by defendants about age. The Court described these as "isolated," *Hazen Paper,* 113 S. Ct. at 1708; we agree that they do not add to plaintiff's case.

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In reconsidering the evidence, we are guided by the Court's teachings in *Hazen Paper* and *St. Mary's*. Our starting point is the Court's statement in *St. Mary's*.

> The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons, will *permit* the trier of fact to infer the ultimate fact of intentional discrimination.

113 S. Ct. at 2749 (emphasis in original).

In the instant case there can be no doubt that plaintiff established a prima facie case and that the jury disbelieved the reasons put forward by the defendants. And there is evidence from which it could be inferred that the disbelief of the jury was accompanied by a suspicion of mendacity: (1) on the state law claim of wrongful discharge the jury found that defendants had agreed, in 1984, to compensate plaintiff with shares of Hazen Paper Company stock and that defendants wrongfully discharged plaintiff in order to deprive him of the promised stock compensation; and (2) the jury also found that this constituted common law fraud under Massachusetts law.

We recognize, of course, that the plaintiff must show both that the employer's reasons were false and that discrimination was the real reason; there must be a finding of discrimination. *Id.* at n.4. The question, therefore, is whether there was evidence from which a finding of discrimination could be made.

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In *Hazen Paper* the Court directly commented on the evidence of age discrimination in addition to that of pension interference:

> Besides the evidence of pension interference, the Court of Appeals cited some additional evidentiary support for ADEA liability. Although there was no direct evidence of petitioners' motivation, except for two isolated comments by the Hazens, the Court of Appeals did note the following indirect confidentiality agreement, even though no other employee had been required to do so, and his replacement was a younger man who was given a less onerous agreement. In the ordinary ADEA case, indirect evidence of this kind may well suffice to support liability if the plaintiff also shows that the employer's explanation for its decision—here, that respondent had been disloyal to Hazen Paper by doing business with its competitors—is " 'unworthy of credence.' "

113 S. Ct. at 1708 (citations omitted). It is true that the Court also stated:

> But inferring age-motivation from the implausibility of the employer's explanation may be problematic in cases where other unsavory motives, such as pension interference, were present.

Id. The Court, however, refused to address this issue and left its resolution to *St. Mary's*. *Id.*

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Because the jury must have found that Hazen Paper's explanation for its decision — that plaintiff had been a disloyal employee — was "unworthy of credence," the indirect evidence was sufficient for the jury's finding of discrimination. In other words, plaintiff has met his burden of proving discrimination: he proved a prima facie case; the jury disbelieved the employer's reasons for discharging the plaintiff; and the plaintiff met his ultimate burden of persuasion by adducing additional admissible evidence of age discrimination. *See St. Mary's,* 113 S. Ct. at 2742.

Reading *Hazen Paper* and *St. Mary's* in tandem compels us to conclude that, absent any evidence of interference with the vesting of plaintiff's pension, there was sufficient evidence for the jury to find an ADEA violation.

We therefore re-affirm and adopt the findings made in our prior opinion, *Biggins v. Hazen Paper Co.*, 953 F.2d at 1428-29, affirming in part and reversing in part the judgment of the district court.

1. We uphold the finding of liability on the ADEA count. We find, as a matter of law, that the violation was willful. The damages are reduced from $560,775 to $419,454.38. Because this was a willful violation that amount is doubled to $838,908.76.

2. We uphold the finding of liability on the ERISA count. We order remittitur of $7,000 on the damages award of $100,000.

3. We uphold the finding of liability on the wrongful discharge count. We leave undisturbed the award of one dollar in damages.

4. We uphold the finding of liability on the fraud count and affirm the damages award of $315,098.

Appendix D

5. We reverse the finding of liability on the breach of employment contract count. The damages award on that count of $266,897 in annulled.

6. We affirm the district court's grant on j.n.o.v. on the Massachusetts Civil Rights Act count. This means the jury award of one dollar in damages is annulled.

7. No prejudgment interest can be awarded on the ADEA count. We uphold the awards of prejudgment interest on the ERISA count and the wrongful discharge and fraud counts.

8. We affirm the district court's refusal to enhance plaintiff's attorney's fees.

Remanded for further proceedings consistent with our prior opinion and the opinion of this date.

Costs on appeal awarded to plaintiff.

APPENDIX E — ORDER OF THE SUPREME COURT OF THE UNITED STATES DATED APRIL 20, 1993

SUPREME COURT OF THE UNITED STATES

No. 91-1600

HAZEN PAPER COMPANY, ET AL.,
Petitioners

v.

WALTER F. BIGGINS,
Respondent

ON WRIT OF CERTIORARI to the United States Court of Appeals for the First Circuit.

THIS CAUSE came on to be heard on the transcript of the record from the above court and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the above court in this cause is vacated with costs and that this cause is remanded to the United States Court of Appeals for the First Circuit for further proceedings in conformity with the opinion of this Court.

IT IS FURTHER ORDERED that the petitioners Hazen Paper Company, et al. recover from Walter F. Biggins Five Thousand Six Hundred Five Dollars and Seventy-Three Cents ($5,605.73) for their costs herein expended.

April 20, 1993

Printing of record:	$ 5,305.73
Clerk's costs:	300.00
Total:	$ 5,605.73

APPENDIX F — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS DATED APRIL 5, 1991

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

Civil Action No. 88-0025-F

WALTER F. BIGGINS,

PLAINTIFF,

v.

THE HAZEN PAPER COMPANY,
ROBERT HAZEN AND
THOMAS HAZEN,

DEFENDANTS.

MEMORANDUM AND ORDER

April 5, 1991

FREEDMAN, C.J.

I. INTRODUCTION

On February 16, 1986, plaintiff Walter P. Biggins commenced this action against defendants Hazen Paper Company, Robert Hazen and Thomas Hazen ("defendants" or "the Hazens"), alleging violations of the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.* ("ADEA"), the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001 *et seq.* ("ERISA"), Massachusetts tort and contract law, and the Massachusetts Civil Rights Act, Mass. Gen. Laws ch. 12, §§ 11H, 11I ("MCRA"). A jury found in favor of plaintiff on six of the eight counts in his complaint, and awarded plaintiff substantial damages. After the verdict, both parties submitted post-trial motions.

Four motions, two by plaintiff and two by defendants, are now before the Court. First, defendants have filed a

motion, pursuant to Fed. R. Civ. P. 50(b), for judgment notwithstanding the verdict or, in the alternative, for a new trial. Second, defendants have filed a motion to amend or alter the judgment pursuant to Fed. R. Civ. P. 59(e). Plaintiff opposes these motions.

Third, plaintiff has moved for an award of costs and attorney's fees under provisions of federal and state law. Fourth, plaintiff has filed a motion to compel defendants to increase the amount of the bond that secures plaintiff's judgment during the pendency of the post-trial motions. Defendants oppose plaintiff's motions.

For the reasons stated below, the Court orders judgment notwithstanding the verdict with regard to liquidated damages and the MCRA claim. The Court denies defendants' motion for judgment notwithstanding the verdict or new trial in all other respects. The Court also denies defendants' motion to alter or amend the judgment. The Court grants plaintiff's motion for attorneys' fees in the amount of $175,564.75, and for costs in the amount of $9,760.07. Finally, the Court denies plaintiff's motion to increase the amount of the bond.

II. PRIOR PROCEEDINGS

On July 20, 1990, after one week of trial, a jury of six returned a verdict in favor of plaintiff on six of the eight counts at issue.[1] On Count I, the jury awarded plaintiff $560,775.00 in actual damages under the ADEA, and also found that defendants had wilfully violated the ADEA. On Count II, the jury found that defendants' conduct constituted a violation of ERISA, and awarded $100,000.00 in damages. The jury also awarded plaintiff $1.00 in damages on Count IV for wrongful discharge, $315,098.00 on Count V for fraud, $1.00 on Count VII for a

[1] The jury found in favor of defendants on Counts III (declaratory judgment) and VI (conversion). Because none of the parties have objected to these parts of the verdict, Counts III and VI are not at issue, and the Court will not discuss them.

violation of MCRA, and $266,897.00 on Count VIII for breach of contract. Thus, the jury awarded plaintiff a total of $1,242,772.00.

Subsequent to the verdict, plaintiff filed a motion for an award of liquidated damages. On August 24, 1990, the Court granted plaintiff's motion, based solely on the jury's finding of willfulness and the text of the ADEA. 29 U.S.C. § 626(b); *Biggins* v. *Hazen Paper Co., et al*, Civ. Action No. 88-0025-F, Memorandum and Order (August 24, 1990). Thus, the Court awarded to plaintiff, in addition to the damages awarded by the jury, liquidated damages in an amount equal to the actual damages awarded by the jury on the ADEA claim, that is, $560,775.00. The Court deliberately offered no opinion as to the weight or sufficiency of the evidence with regard to any of the jury's findings. "[T]he Court will withhold its decision as to sufficiency of the evidence, on the question of willfulness as well as on other portions of the verdict, until after judgment is entered." *Id.* at 3-4.

The Court ordered the clerk to enter judgment consistent with the jury verdict and the Court's decision on the liquidated damages question. *Id.* at 4. On August 27, 1990, the clerk entered judgment in the amount of $1,803,547.00, with interest on the ERISA and state law claims in the sum of $196,641.35. Defendants' total liability as of the date of judgment, therefore, was $2,000,188.35.

The Court ordered the clerk to issue an execution on November 7, 1990. Upon issuance of the execution, defendants filed a bond in the amount of $2,100,000.00 to stay execution of judgment pending the Court's disposition of post-trial motions. Defend[illegible]ts having provided security, plaintiff has refrained from execution pending the Court's determination of the pending motions.

Appendix F

III. DISCUSSION

A. *Defendants' Motion for Judgment Notwithstanding the Verdict or, in the Alternative, for New Trial*

Defendants seek judgment notwithstanding the verdict, or in the alternative, a new trial on each count on which plaintiff prevailed. Fed. R. Civ. P. 50(b). The Court will first address defendants' arguments for judgment notwithstanding the verdict, and then proceed to the new trial arguments.

1. Judgment Notwithstanding the Verdict

"When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict . . . or by judgment notwithstanding the verdict." *Brady* v. *Southern Railway Co.*, 320 U.S. 476, 479-80 (1943). The Court will grant a party's motion for judgment notwithstanding the verdict only if, viewing evidence and reasonable inferences in a light most favorable to the nonmoving party, reasonable people would nonetheless find in the movant's favor. *Jordan* v. *United States Lines, Inc.*, 738 F.2d 48; 49 (1st Cir. 1984)(citations omitted); *accord deMars* v. *Equitable Life Assurance Society*, 610 F.2d 55, 57 (1st Cir. 1979). "This Court will not grant a judgment notwithstanding the verdict unless the jury's verdict is untenable under any reasonable assessment of the evidence adduced at trial." *Refuse & Environmental Systems, Inc.* v. *Industrial Services of America*, 732 F. Supp. 1209, 1222 (D. Mass. 1990)(Freedman, C.J.).

a. Count I: Age Discrimination in Employment

In order to prevail under the ADEA, a plaintiff must prove that his employer fired him because of his age, that is, that plaintiff's age was "the determinative factor in his discharge." *Freeman* v. *Package Machinery Co.*, 865 F.2d 1331; 1335 (1st Cir. 1988); *Loeb* v. *Textron, Inc.*, 600 F.2d 1003; 1019 (1st Cir.

1979). To properly state a claim under the ADEA, a plaintiff must first establish a *prima facie* case of age discrimination. A plaintiff must show that he was within the protected age group; that he was fired; that he was qualified for the position and performed his job adequately; and that he was replaced by a person with qualifications similar to his own, thus evidencing the employer's continued need for the same skills. *Hebert* v. *Mohawk Rubber Co.*, 872 P.2d 1104, 1110 (1st Cir. 1989); *Freeman*, 865 F.2d at 1335.

Proof of plaintiff's *prima facie* case creates an inference of age discrimination, and places on the employer a burden of articulation or production. While the burden of proof remains at all times with the plaintiff, the employer, having been presented with an inference of discrimination, bears the burden of articulating a valid, non-discriminatory reason for the firing. *Freeman*, 848 F.2d at 1335.

If the employer produces a legitimate reason for the firing, "the initial presumption of age discrimination is dissolved and plaintiff must respond by showing that the reasons presented by the defendant are merely pretextural." *Hebert*, 872 F.2d at 1111; *Freeman*, 865 F.2d at 1336. Plaintiff must "prove by a preponderance of the evidence that the defendant's true motive was age discrimination." *Menard* v. *First Security Services Corp.*, 848 F.2d 281, 285 (1st Cir. 1988). Thus, in the end, a plaintiff must prove that the employer's alleged reasons for discharging plaintiff were fictitious and designed merely to mask age discrimination. *Freeman*, 865 F.2d at 1336.

The record plainly indicates that plaintiff established a *prima facie* case, and defendants do not appear to dispute this. Rather, the Hazens contend that they fired plaintiff because of plaintiff's disloyalty and his refusal to sign a legitimate confidentiality agreement. Defendants point to plaintiff's involvement with other businesses competing in the paper industry as evidence of plaintiff's disloyalty. In short, defendants argue that they had a valid, non-discriminatory reason for discharging plaintiff, that the record contains overwhelming evidence

in their favor, and that the jury verdict to the contrary lacks evidentiary support. The Court disagrees, and now holds that plaintiff offered evidence sufficient to sustain his burden of proof under the ADEA. Thus, the jury verdict as to age discrimination must stand.

Plaintiff offered the following as evidence of age discrimination. Plaintiff testified that defendants presented him with a confidentiality agreement, and that plaintiff would have had to sign the agreement in order to keep his job. Trial Transcript, Volume I at 114.[2] Plaintiff alleged that other, younger Hazen Paper employees did not have to sign such an agreement. Plaintiff further testified that the agreement did not provide for severance pay for plaintiff. However, when defendants hired a younger employee, one McDonald, to replace plaintiff, Mr. McDonald was offered a confidentiality agreement that provided for 100 days of separation pay. Further, Mr.McDonald's confidentiality agreement included a six-month noncompetition clause, whereas plaintiff's agreement contained a two-year non-competition clause. 4 Tr. 92 (testimony of Thomas Hazen).

Plaintiff also offered evidence that defendants fired plaintiff in order to prevent plaintiff from acquiring any pension entitlements. While the discharge of an employee in order to eliminate the employee's pension rights cannot, by itself, establish age discrimination, courts have held that such conduct provides some proof of an ADEA violation. *Visser* v. *Packer Engineering Associates, Inc.*, 924 F.2d 655, 658 (7th Cir. 1990); *Benjamin* v. *United Merchants and Manufacturers, Inc.*, 873 F.2d 41, 43 (2d Cir. 1989). It is undisputed that a Hazen Paper employee acquires vested rights to pension benefits after having worked for Hazen for ten years. Plaintiff testified that at the time of his discharge, he "was just a few hours away from being fully vested" in the pension plans offered by Hazen Paper Company. 1 Tr. 128. Thomas Hazen was in charge of pension account matters

[2] The trail transcript comes in six volumes. The Court will cite the trial transcript by volume number and page. For example, the Court would cite to page 25 of volume 2 as follows: 2 Tr. 25.

at Hazen Paper Company, and regularly received pension account documents regarding individual employee pension status. 4 Tr. 94-95. Thomas Hazen testified that at the time of plaintiff's termination, plaintiff had nine years and several months of service at Hazen Paper Company. 4 Tr. 97-98. While Thomas Hazen denied discharging plaintiff to prevent his pension rights from vesting, the jury could reasonably have found that defendants knew of plaintiff's status as to the pension fund, and chose to discharge him with the intent to interfere with his pension rights.

Plaintiff testified that the Hazens also made comments with regard to plaintiff's age. On the first day of trial, plaintiff testified that Thomas Hazen had stated that "it was costing him a lot more for my [insurance] policy because I was so old." 1Tr.151. According to plaintiff, Robert Hazen had also mentioned that the Hazen's handball court membership would not be useful for plaintiff because of plaintiff's age. 1 Tr. 151.

The jury also heard evidence regarding defendants' offer of a consulting arrangement to plaintiff. Thomas Hazen testified that in May of 1986, before plaintiff was fired, he offered plaintiff a consulting contract. Thomas Hazen testified that persons employed by Hazen Paper as consultants did not accrue employee benefits: no vacation benefits, pension rights, or health or disability insurance. 4 Tr. 106-107. From this testimony, the jury could reasonably have concluded that defendants sought to receive plaintiff's services, but did not wish to extend to plaintiff certain benefits that were offered to younger employees.

While the Court finds this evidence of age discrimination a bit thin, the evidence is sufficient to support the jury's verdict. A judge may not grant judgment notwithstanding the verdict simply because he would have reached a different conclusion had he been the trier of fact. *Borras* v. *Sea-Land Service, Inc.*, 586 F.2d 881, 887 (1st Cir. 1978). Rather, judgment notwithstanding the verdict is appropriate only where the evidence can reasonably lead to only one conclusion. Because the Court finds that the jury could have reasonably found age discrimination,

based on the evidence adduced at trial and reasonable inferences drawn therefrom, the verdict as to age discrimination will stand.

b. Liquidated Damages: The Question of Willfulness

On the issue of willfulness, however, the Court finds the evidence deficient. In *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111 (1985), the Supreme Court, adopting a Second Circuit definition, held that a violation of ADEA is willful if the employer "knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." *Id.* at 126, *citing Air Line Pilots Ass'n, International* v. *Trans World Airlines, Inc.*, 713 F.2d 940, 956 (2d Cir. 1983), *aff'd in part and rev'd in part, Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111 (1985).[3] In adopting the "knew or showed reckless disregard" standard, the Supreme Court explicitly rejected the notion that a willful violation exists where "the employer simply knew of the potential applicability of the ADEA," *Thurston*, 469 U.S. at 127, or where the employer merely knew that the ADEA was "in the picture." *Id.*, *citing Coleman* v. *Jiffy June Farms, Inc.*, 458 F.2d 1139, 1142 (5th Cir. 1971), *cert.*

[3] Prior to *Thurston*, the First Circuit in *Loeb* held that a violation of the ADEA is willful if "done voluntarily and intentionally, and with the specific intent to do something the law forbids; that is to say, with bad purpose either to disobey or to disregard the law." 600 F.2d at 1020, n. 27, *quoting* E.Devitt & C. Blackmar, *Federal Jury Practice and Instructions* § 14.06, at 384 (3d ed. 1977). In *Thurston*, however, the Supreme Court adopted the "knew or showed reckless disregard" standard for willfulness in ADEA cases. The Supreme Court further stated that "[w]e do not agree with TWA's argument that unless it intended to violate the Act, double damages are inappropriate under § 7(b) of the ADEA. Only one Court of Appeals has expressed approval of this position. *See Loeb* v. *Textron, Inc.*, 600 F.2d 1003, 1020, n. 27 (1st Cir. 1979)." *Thurston*, 469 U.S. at 128 n. 19.

While the First Circuit has not expressly overturned *Loeb* with respect to the standard for determining willfulness,, the First Circuit has applied *Thurston*, without reference to *Loeb*, when deciding the question of willfulness under the ADEA. *Aledo-Garcia* v. *Puerto Rico National Guard Fund, Inc.*, 887 F.2d 354, 357 (1st Cir. 1989). Thus, the Court finds that the language of *Thurston* operates to overrule *Loeb* with respect to the standard of willfulness that applies in ADEA cases.

denied, 409 U.S. 948 (1972). The Supreme Court rejected these proposed standards because they "would result in an award of double damages in almost every case." *Thurston*, 469 U.S. at 128. "Both the legislative history and the structure of the statute show that Congress intended a two-tiered liability scheme. We decline to interpret the liquidated damages provision of ADEA § 7(b) [29 U.S.C. § 626(b)] in a manner that frustrates this intent." *Id.*

It is with some difficulty that the Court applies the "knew or showed reckless disregard" standard to the facts of the instant case. In *Thurston*, Trans World Airlines ("TWA") adopted a policy which allowed airplane captains who were disqualified from serving as captains for reasons not related to age (e.g., medical incapacity) to transfer to positions as flight engineers. However, those captains over the age of sixty could not automatically transfer. Any captain aged sixty years or more could transfer to flight engineer status only if he successfully bid for flight engineer status pursuant to a collective bargaining agreement. The Supreme Court held that the policy discriminated against protected pilots in violation of the ADEA. However, the Court held that the violation was not willful because TWA made good faith efforts to fashion a policy in compliance with the ADEA.

In cases like *Thurston*, which involve employment policies or employment plans, the "knew or showed reckless disregard" standard functions adequately because it penalizes employers who institute discriminatory policies that they know violate that ADEA, or that indicate the employer's reckless disregard for the provisions of the ADEA. Indeed, the "knew or showed reckless disregard standard" guarantees that liquidated damages serve their proper punitive function, different from the pure compensatory role of actual damages. *Thurston*, 469 U.S. at 125.

Unlike *Thurston*, the case at hand involves a claim of discrete employment discrimination. Plaintiff alleged discriminatory treatment against him as an individual based on his age,

without reference to any employment policy. To prevail on his ADEA claim, plaintiff had to prove, and did prove, that " 'but-for' defendants' motive to discriminate against him because of age, he would not have been discharged." *Loeb*, 600 F.2d at 1019. Having so proven, a wooden application of the "knew or showed reckless disregard" standard would not properly distinguish between simple and willful ADEA violations, because plaintiff, in establishing the actual ADEA violation, already had to prove that age discrimination motivated the employer to fire plaintiff. *Menard*, 848 F.2d at 285. The "knew or showed reckless disregard" standard, applied without reference to the two-tiered liability scheme, would therefore result in liquidated damages in practically every case of discrete employment discrimination, despite the Supreme Court's rejection of such a result.

Courts from other circuits have found it necessary to distinguish between simple and willful age discrimination, in an effort to insure that liquidated damages awards do not become automatic. *Turner* v. *Schering-Ploug Corp.*, 901 F.2d 335, 346 (3rd Cir. 1990); *Neufeld* v. *Searle Laboratories*, 884 F.2d 335, 340-41 (8th Cir. 1989); *Hansard* v. *Pepsi-Cola Metropolitan Bottling Co.*, 865 F.2d 1461, 1470 (5th Cir. 1989); *Anderson* v. *Phillips Petroleum Co.*, 861 F.2d 631, 635-36 (10th Cir. 1988). In *Neufeld*, *supra*, for example, the court decided that there must be "direct evidence — more than just an inference from, say, an arguably pretextual justification—of age-based animus" to warrant an award of liquidated damages. *Neufeld*, 884 F.2d at 340.

To date, the First Circuit has offered no guidance on this point. Thus, while the Court will apply the "knew or showed reckless disregard" standard in accordance with controlling precedent, it will not apply that standard in a manner that would frustrate congressional intent or Supreme Court interpretations. Upon consideration of *Neufeld* and similar authorities, the Court now holds that plaintiff, in order to

recover liquidated damages, must prove that the employer engaged in specific age-based conduct that rises above an ordinary ADEA violation. Inferential evidence of discrimination is not enough to establish willfulness. Mere proof of an ADEA violation, without more, does not adequately distinguish between ordinary and willful violations of the ADEA. There must be proof sufficient to push the level of conduct to a higher plateau. Having so stated the law, the Court now decides that the jury's finding of willfulness must be set aside for the following reasons.

The evidence in this case, if examined in relation to ADEA cases considered by courts of appeals in other circuits, is simply not adequate to warrant a finding of willfulness. In *Reynolds* v. *CLP Corporation*, 812 F.2d 671 (11th Cir. 1987), the plaintiff was demoted and then fired from her position as store manager after fifteen years of service. The plaintiff alleged "that CLP engaged in a systematic campaign of harassment and humiliation in an effort to force [plaintiff] to resign." *Id.* at 673. The evidence showed that the employer expressly sought "new" and "young Miss America type" employees. *Id.* The case also included evidence that less than six months before her discharge, the employer demoted plaintiff, cut her pay by $10,000.00, placed her under the supervision of a store manager who "had ways of getting rid of CLP's unwanted employees," *id.*, fired her, and replaced her with a woman in her twenties. The court of appeals upheld the jury's award of liquidated damages.

In *Neufeld*, *supra*, the employer fired plaintiff, age 52, after seventeen years of service in the Kansas City sales district. The employer replaced plaintiff with a twenty-seven year old sales agent. *Neufeld*, 884 F.2d at 337. Testimony of a non-party employee indicated that plaintiff's supervisor from Kansas City, Ed Kill, tried to emulate other sales districts. "Kill said that the Indianapolis district manager had 'gotten rid of the older people . . . [and] had hired younger people,' and that 'this is what [Kill] was trying to do with [the Kansas City] district.'" *Id.* at 338, *citing* district court transcript at 336. The testimony showed that Mr. Kill found Mr. Neufeld to be the appropriate

"sacrificial lamb." *Id.* at 338. Mr. Neufeld was the oldest sales agent in the district, and the evidence clearly supported the jury's finding that Mr. Kill fired Mr. Neufeld because of his age. According to one witness, "Kill commented that 'one way of looking at it, you get rid of the old guys, put in the new people, the figures change.'" *Id.* at 338, *citing* district court transcript at 764. Again, the court of appeals upheld a jury's finding of willfulness.

The *Reynolds* and *Neufeld* cases contain strong evidence of age-based discrimination by the employer. In these cases, the employer demoted the older employee, or cut the employee's pay, or made disparaging statements directed at the employee's age, or otherwise by conduct or statements established a plain nexus between the discharge and the employee's age. In comparison, the instant case, while containing the few strands of age-based evidence summarized above, lacks powerful evidence of age-based animus.

The instant case closely resembles cases such as *Smith* v. *Consolidated Mutual Water Co.*, 787 F.2d 1441 (10th Cir. 1986), where the Tenth Circuit Court of Appeals found no willful ADEA violation. In *Smith*, the plaintiff's supervisor often referred to plaintiff as "an old goat," criticized him for being slow, commented that he had been "knocked around a bit over the years," and fired him in favor of a younger worker. *Smith*, 787 F.2d at 1442. The Court held that "[a]lthough the evidence is thin and circumstantial, we conclude that, taken as a whole, it is enough to permit a reasonable juror to infer that age was a determinative factor in Consolidated's decision." *Id.* While the court of appeals found that plaintiff had adequately proven an ADEA violation, the court held that "[t]he thin nature of the evidence presented by Mr. Smith at trial compels us to agree with the trial court that Consolidated's conduct was not 'willful' under the standard announced by the Supreme Court in *Trans World Airlines, Inc.* v. *Thurston*, *supra*." *Id.* at 1443.

The Court has also considered *Morgan* v. *Arkansas Gazette*, 897 F.2d 945 (8th Cir. 1990). In *Morgan*, numerous Gazette

employees testified regarding the age-based employment decisions allegedly made by a particular Gazette manager, one Tinker. The record indicated "a pattern of employees over the age of forty leaving the circulation department and being replaced by younger employees. . . ." *Morgan*, 897 F.2d at 950. Testimony demonstrated age-based hiring, payment and firing practices by Mr. Tinker. The record contained evidence that Mr. Tinker referred to an older employee as an "old fuddy-duddy," and that "no matter what he did, [Morgan] would be fired because Tinker was out to get all the older, experienced employees." *Id.* As in *Smith*, the court of appeals found the evidence sufficient to support a finding of liability, but inadequate under *Thurston* to trigger liquidated damages. *See also Krause* v. *Dresser Industries, Inc.*, 910 F.2d 674 (10th Cir. 1990)(even though jury finds that employer discharged plaintiff in violation of ERISA, court of appeals finds evidence insufficient to support a finding of willfulness); *Gillian* v. *Armtex, Inc.*, 820 F.2d 1387 (4th Cir. 1987)(in affirming judgment notwithstanding the verdict on the question of liquidated damages, the court of appeals finds the evidence "too thin" to support of [sic] finding of willfulness).

In the instant case, as in *Smith* and *Morgan*, the evidence was largely circumstantial. Indeed, Mr. Biggins' testimony supplied almost all of the evidence of age discrimination offered in the case. While "[a] claim of discrimination need not be proven solely through direct evidence," *Conway* v. *Electro Switch Corp.*, 825 F.2d 593, 597 (1st Cir. 1987), the Court will not allow liquidated damages if based on sparse or circumstantial evidence, or on self-serving testimony. Having considered the evidence as a whole and as summarized above, the Court finds the evidence incapable of supporting a finding of willfulness.

c. Count II: ERISA

In Count II of the complaint, plaintiff alleges that defendants fired him in order to prevent his attainment of pension rights, in violation of section 510 of ERISA, 29 U.S.C. §1140. The jury

found in plaintiff's favor on Count II, and awarded plaintiff $100,000.00 in damages.

Section 510 provides that "[i]t shall be unlawful for any person to discharge . . . a participant or beneficiary . . . for the purpose of interfering with the attainment of any right to which such participant may become entitled under [an employee pension plan) . . . ." Congress designed section 510 to prevent "unscrupulous employers from discharging or harassing their employees in order to keep them from obtaining vested pension rights." *West* v. *Butler*, 621 F.2d 240, 245 (6th Cir. 1980). To recover under section 510, a plaintiff must prove that "an employer was at least in part motivated by the specific intent to engage in activity prohibited by § 510." *Dister* v. *Continental Group, Inc.*, 859 F.2d 1108, 1111 (2d Cir. 1988)(citations omitted). However, proof that an employee lost pension benefits as a mere consequence of discharge will not create a cause of action under ERISA. *Gavalik* v. *Continental Can Co.*, 812 F.2d 834, 851 (3rd Cir.), *cert. denied*, 484 U.S. 979 (1987); *Titsch* v. *Reliance Group, Inc.*, 548 F. Supp. 983, 985 (S.D.N.Y. 1982), *aff'd mem.*, 742 F.2d 1441 (2d Cir. 1983). Plaintiff must demonstrate that the employer fired him with the "unlawful purpose" to prevent plaintiff from attaining pension rights. *Dister*, 859 F.2d at 1111 (collecting cases).

Plaintiff offered ample evidence of an ERISA violation, and the jury verdict on Count II must therefore stand. Plaintiff testified that at the time of his discharge, he had almost ten years of service at Hazen Paper Company. 1 Tr. 128.[4] Thomas Hazen offered similar testimony. 4 Tr. 97-98. Thomas Hazen also testified that he was in charge of pension account matters at Hazen

[4] After the conclusion of discovery, plaintiff's counsel found that plaintiff may in fact have attained the right to collect pension benefits before defendants fired him. Plaintiff offered into evidence, as exhibit 26, the summary plan description of defendants' pension plan. 4 Tr. 97. The summary plan description provides that "if the aggregate of years and months of service exceeds five, then an additional year will be added in determining your vested percentage." 4 Tr. 97 (testimony of Thomas Hazen). If this provision applied to plaintiff, then plaintiff would have had more than ten years of service for pension purposes.

Paper Company, and regularly received pension account statements regarding individual employee pension status. 4 Tr.94-95. This evidence, in combination with evidence of the proffered consulting position, supports the inference that defendants fired plaintiff with the intent to deprive him of earned pension benefits. Because the jury could reasonably have drawn such an inference from the evidence, the Court will not set aside the verdict with regard to the ERISA claim.

d. Count IV: Wrongful Discharge

On Count IV, the jury returned a verdict in plaintiff's favor, and awarded one dollar in damages.

The general rule in Massachusetts is that an at-will employee-like plaintiff may be terminated with or without cause. *Glaz* v. *Ralston Purina Co.*, 24 Mass. App. Ct. 386, 389, 509 N.E.2d 297, 299, *rev. denied*, 400 Mass. 1106, 513 N.E.2d 1289 (1987). Exceptions to the general rule exist, however. For example, an employee has a cause of action for wrongful discharge if the discharge is in bad faith or contrary to public policy. *DeRose* v. *Putnam Management Co., Inc.*, 398 Mass. 205, 210, 496 N.E.2d 428, 431 (1986); *Siles* v. *Travenol Laboratories, Inc.*, 13 Mass. App. Ct. 354, 433 N.E.2d 103, *rev. denied*, 386 Mass. 1103, 440 N.E.2d 1176 (1982).

Defendants argue that "[p]laintiff's recovery for wrongful discharge . . . depends upon the enforceability of the stock promise and whether plaintiff ever was lawful owner of the water based acrylic formula." Defendants' Brief in Reply to Plaintiff's Opposition to Defendants' Motion for Judgment Notwithstanding the Verdict at 12 (October 23, 1990) ("Defendants' JNOV Reply"). Defendants contend that "[p]laintiff's claim has always been that selling the rights to 'his process or formula' was consideration for Hazen stock." Defendants' Brief in Support of Motion for Judgment Notwithstanding the Verdict at 11 (September 11, 1990)("Defendants' Brief for JNOV"). Because the jury found that plaintiff never owned the paper treatment formula in question, defendants argue, any alleged

stock-for-formula agreement lacks consideration, and is unenforceable. Thus, defendants contend that they cannot be liable for wrongful discharge, because the firing of plaintiff did not prevent plaintiff from receiving a benefit to which he was entitled.

The Court finds defendants' argument unpersuasive because it does not properly characterize plaintiff's wrongful discharge claim. It is true that the jury found that plaintiff had no ownership rights to the formula. *See* Special Verdict at 3 (July 20, 1990). However, while plaintiff does claim that defendants agreed to compensate him with stock in return for use of the formula, plaintiff also contends that defendants promised the stock as compensation for services rendered. No party disputes that plaintiff repeatedly sought greater compensation for his work at Hazen Paper Company; the disagreement centers around what defendants did to accommodate plaintiff's demand.

Plaintiff's version is that defendants agreed that plaintiff deserved a $100,000.00 salary for the work he performed for defendants, 1 Tr. 97, and that defendants agreed to pay plaintiff "the difference between my salary and $100,000.00 in stock." 1 Tr. 98. Plaintiff testified that when reminded by plaintiff of the stock promises, Thomas Hazen never denied that he promised plaintiff stock compensation, 1 Tr. 105, 125, but that defendants nevertheless failed to tender the stock as promised. *Id.* Plaintiff further testified that he agreed to sign over to defendants any rights he had to the paper treatment formula in return for fulfillment of the stock promises. 1 Tr. 98-99. Finally, after plaintiff refused to sign the confidentiality agreement, defendants fired plaintiff in order to avoid honoring their stock promise. 1 Tr. 126-27.

Given this evidence, the Court finds ample consideration for the stock promise alleged by plaintiff. The agreement called for increased compensation for plaintiff, in the form of salary or its equivalent. The consideration for the stock promise was the present and continued satisfactory performance of services for

Hazen Paper Company. Thus, while the jury's verdict with regard to the ownership of the formula does reject the notion that plaintiff had any ownership right to the formula, it does not entirely destroy consideration for the stock promise.

The evidence also suffices to support the verdict for wrongful discharge. As noted above, plaintiff in this case testified — and the jury found — that defendants promised plaintiff stock, as a substitute for salary, equal in value to the difference between plaintiff's salary and $100,000.00. Plaintiff also testified that while the Hazens never denied promising the stock, they never delivered on the promise, and fired plaintiff in order to avoid rendering the promised compensation. Therefore the Court will not disturb the jury's verdict on Count IV.

e. Count V: Fraud

In Count V, plaintiff alleged that defendants fraudulently failed to honor their promise to compensate plaintiff with stock. The jury found in plaintiff's favor, and awarded plaintiff $315,098.00 in damages for fraud.

> "[A] fraud may be defined to be any artifice whereby he who practices it gains, or attempts to gain, some undue advantage to himself, or to work some wrong or do some injury to another, by means of a representation which he knows to be false, or of an act which he knows to be against right or in violation of some positive duty."

Commonwealth v. *O'Brien*, 305 Mass. 393, 397-398, 26 N.E.2d 235, 238 (1940), *quoting Commonwealth* v. *Tuckerman*, 76 Mass. (10 Gray) 173, 203 (1857). An action in fraud requires plaintiff to prove "that the defendant made a false representation of a material fact with knowledge of its falsity for the purpose of inducing the plaintiff to act thereon, and that the plaintiff relied upon the representation as true and acted upon it to his damage." *Barrett Associates, Inc.* v. *Aronson*, 346 Mass. 150, 152, 190 N.E.2d 867, 868 (1963), *quoting Kilroy* v. *Bar-*

ron, 326 Mass. 464, 465, 95 N.E.2d 190, 191 (1950). Because the evidence adduced at trial amply satisfies these elements, the jury verdict for fraud will stand.

In essence, defendants' attack on the jury's fraud verdict comes in two parts. First, defendants argue that plaintiff failed to prove detrimental reliance on defendants' misrepresentation. Second, defendants assert that plaintiff never established damages directly resulting from defendants' misrepresentation. The Court will discuss each contention in turn.

A plaintiff must prove more than mere deception to establish a cause of action for fraud. Massachusetts case law requires that a plaintiff show detrimental reliance in order to collect for fraud. *Nei* v. *Burley*, 388 Mass. 307, 311, 446 N.E.2d 674, 677 (1983); *Kilroy*, 326 Mass. at.465, 95 N.E.2d at 191. Courts will find detrimental reliance where the misrepresentation "materially influenced" the plaintiff, in whole or in part, to take action or refrain from acting. *National Shawmut Bank* v. *Johnson*, 317 Mass. 485, 490, 58 N.E.2d 849, 852; *Schinkel* v. *Maxi-Holding, Inc.*, 30 Mass App. Ct. 41, 48, 565 N.E.2d 1219, 1224 (1991)(plaintiff adequately states a claim for fraud where, although plaintiff rendered managerial services and partial payments in reliance on defendants' promise to tender company stock, defendants refused to deliver stock as promised).

Massachusetts law further provides that in a fraud action, the misrepresentation need not be the sole or predominating motive that induced the victim to engage in particular conduct. *National Shawmut Bank*, 317 Mass. at 490, 58 N.E.2d at 852. There may be one or many motivating reasons for a person's act or omission; but if a person acts or refrains from acting, in complete or partial reliance on a false representation, the element of detrimental reliance is satisfied. *See National Car Rental System, Inc.* v. *Mills Transfer Company*, 7 Mass. App. Ct. 850, 852, 384 N.E.2d 1263, 1264 (1979).

Defendants argue that because the jury found that plaintiff never owned the formula, plaintiff cannot assert that his "detriment" was loss of rights to the formula. Defendants' Brief for

JNOV at 12-13. While the Court agrees with defendants that plaintiff cannot claim as his legal detriment the loss of rights to the formula, plaintiff adequately proved other legal detriment sufficient to support a finding of fraud. As with the wrongful discharge count, *see supra* at 19-22, plaintiff's rendition of present and continuing service at Hazen Paper Company provides the legal detriment for the fraud claim. All parties agree that plaintiff sought a $100,000.00 salary in exchange for his continuing employment. Plaintiff testified, and the jury apparently believed, that defendants agreed to pay plaintiff approximately $44,000.00 in salary, and the balance of plaintiff's compensation in stock. 1Tr.98. Thus, the jury could have found that plaintiff continued to work for Hazen Paper Company, after defendants initially promised to give plaintiff stock, in reliance on the stock promise. This provision of continued services in exchange for the stock promise is sufficient to provide "detrimental reliance."

Defendants further argue that plaintiff did not rely to his detriment on defendants' misrepresentation because "plaintiff failed to introduce any evidence indicating that Plaintiff was deprived of alternative employment opportunities by remaining a Hazen employee during the period that the alleged promise was made." Defendants' Brief for JNOV at 13. This argument confuses the element of reliance with the element of damages. Although proof of lost wages or income might help bolster a claim for fraud, plaintiff need not show that his reliance caused him to forego earning opportunities of which he might otherwise have availed himself. Rather, plaintiff need only show that he acted or refrained from acting, at least in part because he relied on the misrepresentation. As discussed *supra*, plaintiff satisfied the reliance element by showing that he continued to work at Hazen Paper Company, after the misrepresentation, in part because the Hazens promised to compensate him with shares of Hazen Paper Company stock in addition to his salary.

With respect to damages, however, a plaintiff who alleges

may recover according to the "benefit of the bargain" rule. *Productora e Importadora de Papel, S.A. de C.V.* v. *Fleming*, 376 Mass. 826, 838, 383 N.E.2d 1129, 1136-37 (1978); *Rice* v. *Price*, 340 Mass: 502, 507-511, 164 N.E.2d 8911 894-97 (1960). This means that plaintiff may recover as damages the value of the benefit that he would have received had the misrepresentations been true. Under the benefit of the bargain rule, "damages would be measured by the difference in value between the performance promised . . . and that actually rendered." *Fleming*, 376 Mass. at 838, 383 N.E.2d at 1137.

In this case, plaintiff offered evidence of the value of the stock promised him. Plaintiff's witnesses testified to the value of Hazen stock in the relevant years, 2 Tr. 154-55 (John T. Moriarty, certified public accountant), and to the value of the total stock that plaintiff would have received had defendants honored their stock promise. 2 Tr. 193-94 (Dr. Craig L. Moore, professor of management at the University of Massachusetts); *see* Plaintiff's Trial Exhibit 21 (containing Dr. Moore's calculations regarding stock loss, estimated at $342,498.00). This unrefuted testimony provides sufficient evidence of damages, consistent with the "benefit of the bargain" rule, in an amount equal to the value of the compensation that plaintiff would have received had defendants made good on the stock promise.

In short, because plaintiff offered evidence sufficient to satisfy the elements of fraud, the jury's verdict on Count V will stand.

f. Count VII: Massachusetts Civil Rights Act

On Count VII, the jury found that defendants violated plaintiff's rights under the Massachusetts Civil Rights Act, Mass. Gen. Laws ch. 12, §§ 11H, 11I ("MCRA"). The jury awarded damages in the amount of $1.00.

The Massachusetts legislature created the MCRA to protect individuals from civil rights violations perpetrated by private parties. *Redgrave* v. *Boston Symphony Orchestra, Inc.*, 399 Mass. 93, 98, 502 N.E.2d 1375, 1378 (1987) (MCRA contains no

state action requirement). Courts should construe the provisions of the MCRA broadly in order to effectuate the remedial purposes of the statutes. *Batchelder* v. *Allied Stores Corp.*, 393 Mass. 819, 822, 473 N.E.2d 1128, 1130 (1985) ("*Batchelder II*").

To establish a violation of the MCRA, a plaintiff must prove that

> (1) his exercise or enjoyment of rights secured by the Constitution or laws of either the United States or of the Commonwealth (2) has been interfered with, or attempted to be interfered with, and (3) that the interference or attempted interference was by "threats, intimidation or coercion."

Bally v. *Northeastern University*, 403 Mass. 713, 717, 532 N.E.2d 49, 51-52 (1989). Of course, "[n]ot every violation of law is a violation of the State Civil Rights Act." *Longyal* v. *Commissioner of Correction*, 404 Mass. 325, 3331 535 N.E.2d.588, 593 (1989). "[T]he legislature did not intend to create 'a vast constitutional tort,' and thus explicitly limited the [MCRA]'s remedy to situations where the derogation of secured rights occurs by threats, intimidation or coercion." *Bally*, 403 Mass. at 718, 532 N.E.2d at 52, *quoting Bell* v. *Mazza*, 394 Mass. 176, 182-183, 474 N.E.2d 111 (1985)

Defendants argue that the Court should grant judgment notwithstanding the verdict because, contrary to plaintiff's contention, defendants did not deprive plaintiff of any property rights. Defendants further argue that even if defendants did deprive plaintiff of some property right, no threat, intimidation, or coercion was involved.

Plaintiff, on the other hand, has consistently asserted that defendants used threats, intimidation and coercion in an effort to take plaintiff's property rights to the formula without just compensation. *See, e.g.*, Plaintiff's Brief in Opposition to Defendants' Motion for Summary Judgment at 25 (April 13,

1990); Plaintiff's Amended Complaint at 12 (July 26, 1988). Given the jury's verdict as to ownership of the formula, however, this argument must fail. Any claim by plaintiff based on ownership rights to the formula must fail in light of the jury's determination that defendants owned the formula throughout the relevant time period.

Apparently in response to the jury's verdict, plaintiff makes a slightly different argument with regard to his MCRA claim in his post-trial pleadings. Plaintiff now argues that defendants interfered with plaintiff's rights to Hazen Paper Company stock. "[Plaintiff's] property right to the stock was the subject of coercion when the Defendants attempted to extort from him a release of the formula rights without payment of their stock promise." Plaintiff's Memorandum in Opposition to Defendants' Motion for Judgment Notwithstanding the Verdict at 16 (September 25, 1990). Plaintiff claims that defendants violated the MCRA because they did not tender stock as promised, and that they threatened to and did fire plaintiff in order to avoid the stock obligation. Accepting these allegations as true, the Court must nevertheless grant judgment notwithstanding the verdict on Count VII.

The Supreme Judicial Court has never expanded the MCRA to encompass conduct such as that alleged by plaintiff. Most MCRA actions recognized by the Supreme Judicial Court involve the threat of physical contact. *O'Connell* v. *Chasdi*, 400 Mass. 686, 511 N.E.2d 349 (1987)(sexual harassment in employment); *Batchelder II*, *supra* (plaintiff threatened by shopping mall security officer while plaintiff distributes pamphlets); *Bell*, *supra* (defendants threaten to do "anything at any cost" to prevent improvement of property next door). The Supreme Judicial Court has refused to expand the MCRA to reach drug testing of student athletes by university officials, *Bally*, *supra*, or the improper taking of real property by a town board of selectmen. *Pheasant Ridge Associates* v. *Town of Burlington*, 399 Mass. 771, 506 N.E.2d 1152 (1987). Those few MCRA cases that do not involve threats of physical harm have

involved more than simple violations of law. For example, *Redgrave*, *supra*, concerned conduct that was both in violation of uncontested and existing contract rights, and destructive to the exercise of first amendment or other important individual rights. *See also Longval*, 404 Mass. at 333, 535 N.E.2d at 593 ("A direct violation of a person's rights does not by itself involve threats, intimidation, or coercion. . . ."); *Karetnikova* v. *Trustees of Emerson College*, 725 F. Supp. 73 (D. Mass. 1989).

Given this authority, plaintiff's MCRA claim fails. The evidence simply does not demonstrate "threats, intimidation or coercion" as those words have been defined by the Supreme Judicial Court, and this Court cannot change the scope of state law in order to accommodate plaintiff's claim.

g. Count VIII: Breach of Contract

The jury found defendants liable for breach of employment contract, and awarded plaintiff damages in the sum of $266,897.00.

Defendants contend that no employment contract existed between plaintiff and defendants, and that they are entitled to judgment notwithstanding the verdict on that basis. *See* Defendants' JNOV Reply at 17-19. Defendants further argue that even if defendants did breach an employment contract, plaintiff failed to prove damages resulting from the breach.[5] The Court, however, finds that an employment contract did exist, and that defendants' conduct, viewed in a light most favorable to plaintiff, constituted breach of that contract. The Court fur-

[5] In their motion to alter or amend the judgment, defendants argue that the jury adequately compensated plaintiff under the ADEA claim, and that any award of damages for breach of contract is duplicative. Defendants' Memorandum in Support of Motion to Alter or Amend Judgment at 2 (September 11, 1990) ("Defendants' Memorandum to Alter or Amend"). This argument, although made in the motion to alter or amend, is relevant to the issue of judgment notwithstanding the verdict on the breach of contract claim, because it concerns the element of damages. Thus, the Court will consider defendants' duplicative damages argument in the context of judgment notwithstanding the verdict, and will discuss the remainder of defendants' motion to alter or amend *infra*.

ther finds evidence of damages due to the breach. Therefore, the Court denies defendants' motion for judgment notwithstanding the verdict on the breach of contract claim.

A binding employment contract exists where there is certainty as to the parties bound, the nature of the service, and the approximate compensation due. *Parsons* v. *Trask*, 73 Mass. (7 Gray) 473, 477-78 (1856). A valid employment contract may be "'found to exist from the conduct and relations of the parties.'" *Jackson* v. *Action for Boston Community Development*, 403 Mass. 8, 9, 525 N.E.2d 411, 413 (1988), *quoting LiDonni, Inc.* v. *Hart*, 355 Mass. 580, 583, 246 N.E.2d 446, 449 (1969). Where an employee provides services in return for wages paid by the employer, courts will, in the absence of express provisions to the contrary, infer the existence of an at-will employment contract. *Jackson*, 403 Mass. at 13, 525 N.E.2d at 414; *DeRose*, 398 Mass. at 206, 496 N.E.2d at 429.

If nothing more, plaintiff in this case had an at-will employment contract with defendants. Plaintiff received wages in return for services rendered. In addition, the jury could, and apparently did, find that the circumstances surrounding plaintiff's employment and the language in the Hazen Paper Company manual supplied additional implied provisions to plaintiff's employment contract. Massachusetts law permits such a finding. *Jackson*, 403 Mass. at 14, 525 N.E.2d at 415 (collecting cases). Viewing the evidence in a light most favorable to the plaintiff, the jury could have found that the employment contract prohibited defendants from firing plaintiff unless plaintiff committed "outlandish, gross violations of standards or fail[ed] to respond to repeated counselling. . . ." Plaintiff's Trial Exhibit 11 at 3 (Hazen Paper Company Employee Handbook on Personnel Policies and Benefits).

Having established the existence of the contract and its terms, plaintiff also demonstrated that defendants breached the contract. Again viewing the evidence in a light most favorable to

plaintiff, the jury could have found that defendants breached the contract in all or any of three ways: by discharging plaintiff because of his age, by discharging plaintiff in order to prevent him from enjoying his pension rights, or by discharging plaintiff in order to avoid honoring their stock promise. The Court has adequately reviewed the evidence of these illegalities *supra*.

However, once plaintiff establishes the existence of a contract and a breach of that contract, he must also prove that he suffered damages caused by defendants' breach of the contract. *Goldman* v. *Mahoney*, 354 Mass. 705, 709, 242 N.E.2d 405, 409 (1968); *Gray* v. *Tobin*, 252 Mass. 238, 147 N.E. 580 (1925). Plaintiff may not collect duplicate damages under a state law theory if the jury has already compensated him under a federal statute. *See Howard* v. *Daiichiya-Love's Bakery, Inc.*, 714 F. Supp. 1108, 1113 (D. Hawaii 1989)(ADEA case); *see also Freeman* v. *Package Machinery Co.*, 865 F.2d 1331, 1344 n.7 (1st Cir. 1988). Thus, plaintiff's evidence must show that the damages awarded on the breach of contract claim are independent and separate from the damages awarded under the ADEA, ERISA, fraud or other counts.

Defendants here argue that plaintiff's recovery for breach of contract duplicates damages already recovered under the ADEA. The Court rejects this argument. As evidence of damages, plaintiff offered the testimony and calculations of Dr. Moore. While all of the damages stated by Dr. Moore's [sic] were compensable under the ADEA, the jury needed not award the money exclusively under that theory. Rather, the jury could have awarded part of the damages under the ADEA, and part under other theories. The jury awarded $560,775.00 under the ADEA, $100,000.00 under ERISA, and $266,897.00 under the breach of contract claim. Such an award, while fragmentary, is permissible under existing law, as long as the total sum awarded by the jury does not exceed the credible evidence of damages offered at trial.

The Court further notes that under existing law, recovery under the ADEA does not preempt tort or contract claims under

state law. *Linn* v. *Andover Newton Theological School, Inc.*, 874 F.2d 1 (1st Cir. 1989)(plaintiff may recover under ADEA and for breach of employment contract); *Cancellier* v. *Federated Department Stores*, 672 F.2d 1312, 1318 (9th Cir.) (court finds that recovery under the ADEA does not preempt award of damages based on defendant's state claim of breach of employment contract), *cert. denied*, 459 U.S. 859 (1982); *accord Pettibon* v. *Pennzoil Products Co.*, 649 F. Supp. 759, 761 (W.D. Pa. 1986).[6] The Court therefore denies defendants' motion for judgment notwithstanding the verdict on the breach of contract claim.

2. New Trial

Having found judgment notwithstanding the verdict inappropriate in all respects except as to willfulness and Count VII, the Court must now consider defendants' new trial arguments.

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[6] The Ninth Circuit Court of Appeals, among other courts, has expressed concern with the "wisdom of allowing open-ended state claims for breach of the implied covenant to coexist with ADEA claims. . . ." *Cancellier*, 672 F.2d at 1318. This Court also dislikes the notion that plaintiff can recover under a state contract theory damages that are available under the ADEA. *See Loeb*, 600 F.2d at 1021. Under the ADEA, a plaintiff may recover " 'items of pecuniary or economic loss such as wages, fringe, and other job-related benefits.' " *Id.*, *quoting* H. Conf. Rep. No. 95-950, 95th Cong., 2d Sess. 13, *reprinted in* 1978 U.S. Code Cong. & Admin. News at 523, 535. Arguably, plaintiff received under the ADEA all the damages to which he was entitled. Indeed, the Court finds no evidence of record showing that plaintiff suffered damages from the breach of contract separate and independent from those already recovered pursuant to the ADEA, ERISA, or fraud. To the contrary, it seems likely that the awards returned under the various state law counts (totalling $581,997.00) represent small parts of the larger ADEA award. However, the Court will not speculate as to the jury's calculations. Absent any instructive First Circuit authority with regard to whether plaintiffs can recover, on a state contract theory, damages available under the ADEA, the Court is reluctant to disturb the jury's verdict. Thus, because plaintiff has established the elements of breach of contract, the jury may under existing law award him additional damages under that theory.

Appendix F

> The Court may set aside a verdict and grant a new trial "when the verdict is against the clear weight of the evidence, or is based upon evidence which is false, or will result in a clear miscarriage of justice." *Phav* v. *Trueblood, Inc.*, 915 F.2d 764, 766 (1st Cir. 1990) (citations omitted). While a trial court should not grant a new trial simply because the court would have reached a different conclusion, the court wields broad discretion in determining whether to grant a new trial. *de Perez* v. *Hospital del Maestro*, 910 F.2d 1004, 1006 (1st Cir. 1990). This Court exercises its discretion frugally, and will not grant a new trial unless necessary to prevent a significant dereliction of justice.

Flag Fables, Inc. v. *Jean Ann's Country Flags and Crafts, Inc.*, 753 F. Supp. 1007, 1012 (D. Mass. 1990)(Freedman, C.J.).

Defendants make numerous arguments in support of their motion for new trial. *See generally* Defendants' Brief in Support of Motion for New Trial (September 11, 1990)("Defendants' Brief for New Trial") and Defendants' Brief in Reply to Plaintiff's Opposition to Defendants' Motion for New Trial (October 23, 1990)("Defendants' New Trial Reply"). Some of these arguments were rejected *supra* with respect to defendants' motion for judgment notwithstanding the verdict, and the Court finds them equally impotent in the new trial context. The Court will, however, briefly discuss two of defendants' most vehement arguments.

Defendants first argue that the jury awarded an excessive amount of damages. While a court may grant a new trial if the jury has awarded excessive damages, a jury may if it chooses award generous damages. In cases involving age discrimination, the district court may set aside damages awards and grant a new trial only if the verdict is "shown to exceed 'any rational appraisal or estimate of the damages that could be based upon

the evidence before the jury.'" *Kolb* v. *Goldring, Inc.*, 694 F.2d 869, 871 (1st Cir. 1982), *quoting Glazer* v. *Glazer*, 374 F.2d 390, 413 (5th Cir.), *cert. denied*, 389 U.S. 831 (1967). The cases clearly indicate that where credible evidence of damages exist, the court may not disturb the jury award. *Cf. Hendricks & Associates, Inc.* v. *Daewoo Corp.*, 923 F.2d 209 (1st Cir. 1991)(court orders remittitur or new trial where jury awarded damages in excess of those sought by plaintiff). "While in calculating damages the jury is free to select the highest figures for which there is adequate evidentiary support, it may go no higher." *Kolb*, 694 F.2d at 872.

It is uncontested that plaintiff alleged total damages in the amount of $1,375,614.12. 2 Tr. 188 (testimony of Dr. Moore); Plaintiff's Trial Exhibit 21; Plaintiff's Memorandum in Opposition to Defendants' Motion for New Trial at 8 (September 25, 1990). Plaintiff offered the testimony of Dr. Moore and Mr. Moriarty in support of that allegation, and their testimony was unrefuted. It is also true that the jury awarded a total of $1,242,772.00 in damages on all seven counts, some $132,842 less than the damages claimed by plaintiff. Because the jury did not select for total damages a figure higher than that alleged by plaintiff and evidenced in the record, the Court will not set aside any portion of the verdict on this basis.

Second, defendants argue that the jury verdict is internally inconsistent, and must therefore be set aside. Defendants argue that "[i]n order to find age discrimination, the jury had to conclude that Plaintiff's age was the 'determinative factor' in his termination. . . . Because Plaintiff allegedly would not have been terminated "but for" his age, an intent to deprive him of his pension benefits could not, as a matter of law, have been found to be the "motivating" or determinative factor in his termination." Defendants' Brief for New Trial at 3-4. Defendants thus appear to argue that the jury could not have found two determinative factors behind plaintiff's termination. Defendants demand that a new jury should decide whether plaintiff's age,

or the intent to deprive plaintiff of pension benefits, or neither, was the "determinative factor" behind plaintiff's termination.

As noted above, to recover under section 510 of ERISA, a plaintiff must prove that "an employer was at least in part motivated by the specific intent to engage in activity prohibited by § 510." *Dister*, 859 F.2d at 1111; *Baker* v. *Kaiser Aluminum and Chemical Corp.*, 608 F.Supp. 1315, 1318 (N.D. Cal. 1984). A discharged employee need not show that the sole objective behind the firing was to interfere with the employee's attainment of pension rights. *Clark* v. *Resistoflex Co. Division of Unidynamics*, 854 F.2d 762, 770 (5th Cir. 1988), *citing Gavalik*, 812 F.2d at 851. An employee need only show that the employer's desire to interfere with the employee's pension rights "was a 'determinative factor' in [the employer's] decision to terminate him." *Turner*, 901 F.2d at 347, *citing Gavalik*, 312 F.2d it 860.

The First Circuit has never explicitly held that a discharge can be motivated by two different determinative factors sufficient to satisfy both an ERISA and an ADEA claim in the same case. However, in *Loeb*, the First Circuit recognized that employers may have many motivations, both legal and illegal, for firing an employee. *Loeb*, 600 F.2d at 1019. The court of appeals held that while the employee need not prove that age was the sole factor behind the discharge, plaintiff's proof "that [age] was a determinative factor is . . . essential to recovery under the ADEA." *Id.* An employee "had to prove by a preponderance of the evidence that his age was the 'determining factor' in his discharge in the sense that, 'but for' his employer's motive to discriminate against him because of his age, he would not have been discharged." *Id.* Other courts have held that plaintiff must prove that the decision to fire was "at least in part motivated by the specific intent to engage in activity prohibited by [ADEA]." *Dister*, 859 F.2d at 1111.

Given this authority, the Court now holds that there may be more than one illegal determinative factor behind an employer's decision to discharge. Plaintiff's theory in this case offers a

good example, where the jury found that the Hazens discharged plaintiff because of his age and in order to interfere with pension rights. Were the rule otherwise, an employer who, for example, violates the ADEA would be immune from liability under ERISA, even if the evidence indicated discharge with the specific intent to interfere with pension rights. The Court cannot believe Congress intended such a construction of the statutes. Further, the Court can find no case in which a court has dismissed a lawsuit, or any portion of a lawsuit, under the ADEA and ERISA on the basis that there can be only one determining factor for the discharge. In sum, the Court finds no internal inconsistency in the verdict, and the motion for new trial is denied.

B. *Defendants' Motion to Alter or Amend the Judgment*

Defendants have moved to alter or amend the judgment pursuant to Fed. R. Civ. P. 59(e). Defendants make three separate arguments in support of their motion. First, defendants argue that the jury awarded duplicative damages, and that the Court should alter the judgment to prevent multiple recovery. The Court, having already found this apple unappealing, *supra* at 30-34, will not taste it again.

Second, defendants contend that plaintiff may not receive prejudgment interest on any part of his award if he has recovered liquidated damages. This is unquestionably true. *Linn* v. *Andover Newton Theological School, Inc.*, 874 F.2d 1 (1st Cir. 1989). However, the point is moot, given the Court's decision to grant defendants' motion for judgment notwithstanding the verdict on the liquidated damages question. Thus, plaintiff may collect interest on his entire award because plaintiff is not entitled to liquidated damages.

Defendants' third argument is that plaintiff may not recover interest on the fraud count because "the jury's award is clearly based upon the higher, present value of the stock." Defendants' Memorandum to Alter or Amend at 3. This argument lacks

merit. The Court must assume that the jury awarded that sum of money it felt necessary to compensate plaintiff for his loss due to defendants' misrepresentation. Indeed, no one except the jury really knows how the jury calculated the fraud award. The fact that plaintiff recovered the value of stock does not make this claim any different from other state tort claims. In fraud cases, plaintiffs often recoup money representing the value of a thing promised but not delivered. Plaintiff shall recover interest at the ordinary rate on the fraud award.

In sum, the Court denies entirely defendants' motion to alter or amend the judgment.

C. *Plaintiff's Motion for Attorney's Fees and Costs*

1. Attorney's Fees

Plaintiff has moved for an award of attorney's fees in the sum of $666,729.12. Defendants oppose plaintiff's request, and urge the Court to allow a much more modest award.

A successful plaintiff is entitled to collect reasonable attorney's fees under the ADEA. Section 626(b) of the ADEA requires that the provisions of the ADEA shall be enforced in accordance with the remedies and procedures provided in section 16 of the Fair Labor Standards Act, 29 U.S.C. § 216 ("section 216"). As amended, section 216 states that "[t]he court . . . shall, in addition to any judgment award to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and the costs of the action." The statutory language makes the award mandatory; the Court has discretion only to determine the amount of the fee award.

In civil rights cases, courts use the lodestar method to determine appropriate attorney's fees awards. *Blum* v. *Stenson*, 465 U.S. 886 (1984)(42 U.S.C. § 1983); *Hensley* v. *Eckerhart*, 461 U.S. 424 (1983); *Wildman* v. *Lerner Stores Corp.*, 771 F.2d 605 (1st Cir. 1985)(ADEA). The lodestar is calculated by multiplying all of the hours reasonably expended on the litigation by a

reasonable hourly rate. *Blum*, 465 U.S. at 888. Courts should calculate reasonable attorney's fees according to prevailing market rates. *Id.* at 895. Once the court has determined the lodestar, the court may adjust the lodestar, up or down, if necessary to assure fair and adequate compensation for counsel. Courts should allow upward adjustment only "in some cases of exceptional success," *Hensley*, 461 U.S. at 435, and where plaintiff's counsel proves "that such an adjustment is necessary to determination of a reasonable fee. . . ." *Blum*, 465 U.S. at 898.

Section 1132(g) of ERISA also allows courts to award attorney's fees, but under different circumstances. While the ADEA provides for a mandatory fees award, section 1132(g) provides that "the court in its discretion may allow a reasonable attorney's fee and costs of action to either party." The award of attorney's fees under ERISA falls within the broad discretion of the district court. *Gray* v. *New England Telephone & Telegraph Co.*, 792 F.2d 251, 259 (1st Cir. 1986). The court must apply a five-pronged test when considering whether to award attorney's fees.

> This five factor standard considers (1) the degree of bad faith or culpability of the losing party; (2) the ability of such party to personally satisfy an award of fees; (3) whether such award would deter other persons acting under similar circumstances; (4) the amount of benefit to the action as conferred on the members of the pension plan; and (5) the relative merits of the parties' positions.

Id. at 257-58. If, upon consideration of these factors, the district court decides to award fees, the court may rely on the lodestar method to determine the amount of the award. *Hensley*, 461 U.S. at 433 n. 7 (lodestar analysis is generally applicable in all federal fee-shifting situations); *D'Emanuele* v. *Montgomery Ward & Co., Inc.*, 904 F.2d 1379, 1382-83 (9th Cir. 1990).

The Court finds that the circumstances of this case make an

award of attorney's fees under ERISA appropriate. In particular, the evidence that plaintiff had more than nine years service at Hazen Paper Company, and that defendants fired plaintiff in order to interfere with his attainment of pension rights tips in favor of an award of attorney's fees. The general deterrent value of an attorney's fee award on industry and pension plans in the area also makes an award suitable.

Plaintiff also prevailed on various state law claims, none of which provide for attorney's fees.[7] Ordinarily, a prevailing litigant in the United States may not recover attorney's fees or costs of his action absent an express legislative directive to the contrary. *Alyeska Pipeline Service Co.* v. *The Wilderness Society*, 421 U.S. 240, 247 (1975). However, the *Alyeska* rule does not prevent fee-shifting when a plaintiff successfully prosecutes a claim under a federal civil rights statute, and in the same action seeks additional or similar relief under other federal theories or pendant state law theories. Under these circumstances, a plaintiff may recover attorney's fees incurred for both his civil rights claim and the companion claims, regardless of whether the statutes upon which the companion claims are based provide for attorney's fees awards. *Hensley*, 461 U.S. at 435; *Wagenmann* v. *Adams*, 829 F.2d 196, 225 (1st Cir. 1987). Of course, the additional claims must bear a close relationship to the federal civil rights claim. If all the claims share "a common core of facts," or are based on "related legal theories," *Hensley*, 461 U.S. at 435, an attorney's fees award should compensate plaintiff based on the time spent on the litigation as a whole. *Accord Aubin* v. *Fudala*, 782 F.2d 287, 290-92 (1st Cir. 1986)(42 U.S.C. §1983).

In the end, the determination of the attorney's fees award remains in the sound discretion of the district court. *United States*

[7] Section 11I of the MCRA provides that "[a]ny aggrieved person or persons who prevail in an action authorized by this section shall be entitled to an award of the costs of the litigation and reasonable attorneys' fees in an amount to be fixed by the court." While the jury returned a verdict in favor of plaintiff on the MCRA claim, the Court today grants judgment notwithstanding the verdict on that claim. Therefor plaintiff may not rely on the MCRA for an award of costs or attorney's fees.

v. *Metropolitan District Commission*, 847 F.2d 12, 14 (1st Cir. 1988). While the district court must supply an ample explanation for the fee award, *id.* at 16, and must "explain why it makes a substantial adjustment, up or down, of a diary-supported bill," *Jacobs* v. *Mancuso*, 825 F.2d 559, 560 (1st Cir. 1987), the district courts need not "drown in the rising tide of fee-generated minutiae." *Metropolitan District Commission*, 847 F.2d at 16.

Plaintiff has submitted ledgers detailing the work performed on the case. The ledgers include the date and type of work performed, an identification of the person who performed the work, and the amount of hours the work required. Plaintiff has also submitted an itemized, computerized record of daily time entries logged by the various individual attorneys that worked on the case. Plaintiff has further submitted affidavits detailing the rates ordinarily commanded by plaintiff's attorneys, and the rates ordinarily charged for cases of this nature. Plaintiff has also explained the contingent nature of the case, and the fact that Mr.Biggins lacked the personal means to bear the costs of maintaining the action since its inception in February of 1988. The Court finds all of these submissions helpful and adequate for the purpose of determining the lodestar.

The Court has carefully examined the documentation in order to determine the number of hours reasonably expended. The Court finds that the documentation adequately distributes core and non-core time. The Court further finds no unreasonable or duplicative fees, and defendants have pointed to no specific instances of misrepresentation or duplicity. The Court finds that plaintiff properly included as core hours the time necessary to complete fee applications. Therefore, the Court adopts, as the number of hours reasonably expended, the core and non-core hours calculated by plaintiff in his motion for attorney's fees and costs. Plaintiff's Motion for an Award of Attorney's Fees and Costs (September 26, 1990)(*see* exhibit A)("Plaintiff's Motion for Fees").

However, the Court will adjust slightly the hourly rates re-

quested by plaintiff. Plaintiff has properly distinguished between core and non-core activities in his fee submissions, but he failed to adopt a different, lower rate of compensation for the non-core hours. The Court, adopting plaintiff's suggestion, will award $165.00 per hour for core work performed by partners at Egan, Flanagan & Cohen, P.C., but the Court will award $100.00 per hour for non-core work performed by these experienced attorneys. *See M. Berenson Co.* v. *Faneuil Hall Marketplace*, 671 F. Supp. 819, 831 (D. Mass. 1987)("The court need not set the same rate for all work performed by a particular attorney; it may assign a different hourly rate to different categories of tasks."). Because no other attorneys performed non-core work, the Court need not discuss other core/noncore payment differentials. The Court will adopt plaintiff's suggestion to compensate Attorney Heemskerk at $135.00 per hour, and the Court will compensate other Egan, Flanagan & Cohen associates at $100.00 per hour. The Court will compensate for paralegal time expended at $50.00 per hour, regardless of the nature of the work.[8]

Having found the requested hours fair and reasonable, and having determined reasonable rates of compensation, the Court calculates the lodestar as follows.

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[8] In determining the hourly rates, the Court has considered, among other things, the following factors: (1) the amounts awarded in other recent cases, such as *Refuse & Environmental Systems Inc.* v. *Industrial Services of America*, 732 F. Supp. 1209 (D. Mass. 1990) (Freedman, C.J.) and *Cowan* v. *Prudential Insurance Company of America*, 728 F. Supp. 87 (D. Conn. 1990); (2) the Court's familiarity with the value of legal services in the current market generally and within this district in particular; (3) plaintiff's suggested rates; and (4) the submitted affidavits of local attorneys.

Appendix F

Partners				
Core Hours		Rate		Totals
959.40	x	$165.00	=	$158,301.00
Non-core Hours				
99.90	x	100.00		9,990.00
Associates				
Atty. Heemskerk				
.25	x	135.00	=	33.75
Other Associates				
57.60	x	100.00	=	5,760.00
Paralegal				
29.60	x	50.00	=	1,480.00
	LODESTAR FIGURE			$175,564.75

The Court's lodestar figure is $6,493.50 less than the lodestar calculated by plaintiff. This difference occurs solely because the Court compensates partners' non-core work at $100.00 per hour, whereas plaintiff's figures compensated partners' non core work at $165.00 per hour.

As noted above, the Court may adjust the lodestar figure if necessary for the determination of a reasonable and fair fee. *Blum*, 465 U.S. at 898. Plaintiff argues that the Court should enhance the fee award to an amount equal to one-third of the total damages awarded, or $666,729.12. Defendants, of course, oppose any such adjustment.

In *Pennsylvania* v. *Delaware Valley Citizens' Council*, 483 U.S. 711 (1987) ("*Delaware Valley II*"), Justice O'Connor[9] decided that while a district court could properly consider the contingent nature of a case when determining a reasonable

[9] The Supreme Court issued three opinions in *Delaware Valley II*. Justice White, representing four members of the Court, wrote the plurality opinion. Four other justices dissented in an opinion written by Justice Blackmun. Justice O'Connor, writing on her own behalf, concurred in part and in the judgment, but agreed with the dissenters on one important point.

Because Justice O'Connor cast the decisive fifth vote in *Delaware Valley II*, her opinion represents a majority of justices to the extent that she expressed agreement with either the plurality or the dissent. Thus, the Court accepts Justice O'Connor's opinion as the law of the land on the issue.

attorney's fee under federal fee-shifting provisions, *id.* at 731, "a court may not enhance a fee award any more than necessary to bring the fee within the range that would attract competent counsel." *Id.* at 733. Likewise, the Court cannot adjust the lodestar due to the " 'legal' risk or risks peculiar to the case." *Id.* at 734. Neither may the Court consider the quality of the representation or the complexity of the case when considering adjustment of the lodestar. *Pennsylvania* v. *Delaware Valley Citizens Council*, 478 U.S. 546, 565 (1986) ("*Delaware Valley I*"). Rather, the lodestar " 'is presumed to be the reasonable fee' to which counsel is entitled." *Delaware Valley I*, 478 U.S. at 564, *citing Blum*, 465 U.S. at 897.

This case is not sufficiently rare or exceptional to justify an enhancement of the lodestar. The Court is satisfied that the lodestar adequately compensates counsel for the work provided in this action, and that an award of $175,564.57 is sufficient to attract competent counsel in the relevant market. Furthermore, the Court cannot, under the law or consistent with conscience, award an attorney's fee almost four times the amount of the lodestar. Such a departure would be an abuse of discretion in light of the frugal methods adopted in recent Supreme Court cases. In sum, because the Court finds that the lodestar figure embodies a reasonable attorney's fee within the meaning of the ADEA and ERISA, the Court will award plaintiff that amount.

2. Costs

Plaintiff may also recover costs of the action under the ADEA and ERISA. As with the attorney's fees, plaintiff may recover costs incurred on the entire action, not just on the federal claims.

Plaintiff claims to have incurred $13,276.57 in costs on the action. The bill properly includes photocopying costs, service of process costs, postage, and other incidentals. However, the bill of costs also includes substantial expert witness fees.

Successful civil rights plaintiffs may not recover more than

$30.00 per day for expert witness attendance fees absent an explicit statutory provision. 28 U.S.C. § 1821; *Denny* v. *Westfield State College*, 880 F.2d 1465, 1468-71 (1st Cir. 1989); *Glenn* v. *General Motors Corp.*, 841 F.2d 1567, 1573-75 (llth Cir.), *cert. denied*, 488 U.S. 948 (1988); *see also Crawford Fitting Co.* v. *J.T. Gibbons, Inc.*, 482 U.S. 437 (1987). Plaintiffs may, however, recover the costs incurred by experts during case preparation, for strategic advice rendered outside the courtroom, and so forth. *Denny*, 880 F.2d at 1474 (Breyer, C.J., concurring) (collecting cases). The ADEA and ERISA, while they do provide for "costs" awards, do not explicitly allow for recovery of expert witness fees. Therefore, the Court must deduct from the costs award those amounts, beyond $30.00, incurred as a result of Dr. Moore's and Mr. Moriarty's attendance.

Plaintiff's bill of costs indicates that plaintiff spent $4,207.50 for the services of Peat, Marwick, Main & Associates, the firm for which Mr. Moriarty works. The bill also shows that Dr. Moore commanded fees totaling $2,945.50. Unfortunately, the bill does not definitively indicate what portion of these fees resulted from the experts' attendance and testimony at trial, and what portion resulted from other, recoverable services rendered by the experts. The Court cannot determine whether the experts charged an hourly fee for attendance, or if they charged lump-sum appearance fees. However, the quality of the testimony and the preparation necessary to properly testify indicates that a substantial portion of the experts' fees were incurred before the experts actually testified. It is fair and reasonable to assume that half of the costs chargeable for the experts resulted from actual testimony time, and half was due to trial preparation and strategy. Thus, plaintiff may recover one-half of expert fees plus the $30.00 attendance fees. The arithmetic yields the following result.

Plaintiff's Costs Incurred	$13,276.57
One-half of Dr. Moore's Fees	- 2,103.75
One-half of Mr. Moriarty's Fees	- 1,472.75
Allowable Attendance Fees	+ 60.00
TOTAL COSTS ALLOWED	$ 9,760.07

Appendix F

D. ***Plaintiff's Motion to Increase the Amount of the Bond***

The Court denies this motion. The question of whether to increase the amount of security is now moot because the Court has ruled on the post-trial motions and plaintiff can execute the judgment. Should defendants appeal today's ruling, they must of course comply with Fed. R. Civ. P. 62(d) and Rule 62.2 of the Local Rules of the United States District Court for the District of Massachusetts.

IV. CONCLUSION

For the reasons stated above, the Court

(1) GRANTS defendants' motion for judgment notwithstanding the verdict on the question of liquidated damages and on count VII, and DENIES the motion for judgment notwithstanding the verdict or new trial in all other respects;

(2) DENIES defendants' motion to alter or amend the judgment;

(3) GRANTS plaintiff's motion for attorney's fees in the amount of $175,564.57, and for costs in the amount of $9,760.07; and

(4) DENIES plaintiff's motion to increase the amount of the bond.

The Clerk is hereby ORDERED to enter judgment in accordance with today's Memorandum and Order, and to award prejudgment interest on the entire award at the appropriate rates.

It is So Ordered.

_____

Chief United States District Judge

APPENDIX G — STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The Age Discrimination in Employment Act, 20 U.S.C. § 623 provides in material part:

> § 623. *Prohibition of age discrimination*
>
> (a) *Employer Practices.* It shall be unlawful for an employer — 1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age[.]

Fed. R. Civ. P. 38(a) provides:

> The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

The Seventh Amendment provides:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Supreme Court, U.S.
FILED
OCT 25 1994
OFFICE OF THE CLERK

No. 94-588

In the Supreme Court of the United States

OCTOBER TERM, 1994

In Re
WALTER F. BIGGINS

ON PETITION FOR A WRIT OF MANDAMUS OR, IN THE ALTERNATIVE, FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF RESPONDENTS HAZEN PAPER COMPANY, ET AL. IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the First Circuit violated the Federal Rules of Civil Procedure or the United States Constitution in ordering a new trial of Petitioner's age discrimination claim, due to the likelihood that jury confusion infected the original verdict.

2. Whether the First Circuit violated the judgment of this Court in ordering a new trial on grounds of jury confusion, where this Court had previously vacated Petitioner's age discrimination verdict and remanded the matter for further consideration of the sufficiency of the evidence and for proceedings not inconsistent with this Court's judgment.

PARTIES

Petitioner and Respondents are identified in the Petition.[1]

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[1] Hazen Paper Company is a private, closely held corporation organized under the laws of the Commonwealth of Massachusetts. The Company has no parent or subsidiary entities.

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In the
Supreme Court of the United States

No. 94-588

OCTOBER TERM, 1994

In Re

WALTER F. BIGGINS

ON PETITION FOR A WRIT OF MANDAMUS OR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

OPINIONS BELOW

The *en banc* opinion of the Court of Appeals on remand (Pet., App. B.) is not reported. The *en banc* opinion of the Court of Appeals denying rehearing (Pet., App. A) is not reported. The panel opinion of the Court of Appeals on remand (Pet., App. D) is not reported. An earlier opinion of the Court of Appeals, subsequently vacated by order of this Court, *see Hazen Paper Co. v. Biggins,* 113 S. Ct. 1701 (1993), is reported at 953 F.2d 1405 (1st Cir. 1992). The Memorandum and Order of the United States District Court for the District of Massachusetts (Pet., App. F) is not reported.

STATUTES, RULES AND CONSTITUTIONAL PROVISION

28 U.S.C. § 2106 provides that:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

The Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*, provides in material part:

> §623. Prohibition of age discrimination
>
> (a) Employer Practices. It shall be unlawful for an employer - 1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age[.]

Fed. R. Civ. P. 38(a) provides:

> The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

The Seventh Amendment to the United States Constitution provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

I. STATEMENT OF THE CASE

The Petitioner in this action, Walter F. Biggins ("Biggins"), was discharged from his position as Technical Director of Hazen Paper Company in June, 1986, when he refused to sign a confidentiality agreement required of him as a condition of continuing employment at the Company. Following his discharge, Petitioner filed a complaint in the United States District Court for the District of Massachusetts alleging, among other things, that the Company and its principal officers, Robert and Thomas Hazen (the "Hazens"), had required him to sign the confidentiality agreement not for any legitimate reason, but rather to force him from the Company before his pension could vest. In this regard, Petitioner alleged that Hazen Paper's conduct had violated his rights under the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* (the "ADEA"), as well as under Section 510 of the Employee Retirement Income Security Act, 29 U.S.C. § 1140 ("ERISA").

A trial of the matter was held before the District Court in July, 1990, and resulted in a verdict for Biggins on both claims.[2] In reviewing the Hazens' motion for judgment notwithstanding the verdict or, in the alternative, for a new trial, the District Court conceded that the evidence of age discrimination was "a bit thin". The Court nonetheless concluded that the evidence -- including, in particular, evidence concerning the Company's alleged intent to deprive Biggins of his pension, *see* App. F. at pp. 34a-35a -- was legally sufficient to support a finding of age discrimination. (*Id.*, at pp. 35a-36a.)

The United States Court of Appeals for the First Circuit affirmed the ADEA verdict, concluding that the evidence was sufficient to warrant a jury finding that the Hazens had acted to prevent Biggins from vesting in

---

[2] The jury also entered verdicts for Biggins on separate state law claims of fraud, wrongful discharge, violation of the Massachusetts Civil Rights Act, Mass. G. L. c. 12, §§ 11H and I, and breach of contract.

his Company pension, and that this amounted to unlawful age discrimination and a violation of ERISA. *See Biggins v. Hazen Paper Co.*, 953 F.2d 1405 (1st Cir. 1992). After noting that Biggins had been the only employee asked to sign a confidentiality agreement, and that his younger replacement was asked to sign a less onerous contract, the Court of Appeals reasoned:

> "[T]he jury could reasonably have found that Thomas Hazen decided to fire Biggins before his pension rights vested and used the confidentiality agreement as a means to that end. The jury could also have reasonably found that age was inextricably intertwined with the decision to fire Biggins. If it were not for Biggins' age, sixty-two, his pension rights would not have been within a hairbreadth of vesting. Biggins was fifty-two years old when he was hired; his pension rights vested in ten years." (*Id.* at 1412.)

After granting certiorari to the Hazens, this Court vacated the First Circuit's decision with respect to ADEA liability. In *Hazen Paper Co. v. Biggins*, 113 S. Ct. 1701 (1993), this Court unanimously held that an employer does not commit unlawful age discrimination if it relies upon criteria that may have some factual correlation to age -- such as years of service or pension status -- but are not in themselves age-based. The Court then remanded the case to the First Circuit for further consideration of whether there was any other evidence sufficient to support a finding of age discrimination. In this regard, the Court stated:

> "Although there was no direct evidence of petitioners' motivation, except for two isolated comments by the Hazens, the Court of Appeals did note the following indirect evidence: Respondent was asked to sign a confidentiality agreement, even though no other employee had been required to do so, and his replacement was a younger man who was given a less onerous agreement. In the ordinary ADEA case, indirect evidence of this kind may well suffice to support liability if the plaintiff also shows that the employer's explanation for its decision -- here, that respondent had been disloyal

to Hazen Paper by doing business with its competitors -- is 'unworthy of credence.' But inferring age-motivation from the implausibility of the employer's explanation may be problematic in cases where other unsavory motives, such as pension interference, were present. This issue is now before us in the Title VII context, *see Hicks v. St. Mary's Honor Center*, 970 F.2d 487 (CA8 1992), *cert. granted*, 506 U.S. ___, 113 S. Ct. 954, 122 L.Ed.2d 111 (1993), and we will not address it prematurely. We therefore remand the case for the Court of Appeals to reconsider whether the jury had sufficient evidence to find an ADEA violation."

Hazen Paper, 113 St. Ct. at 1708.

This Court subsequently announced its decision in *St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742 (1993). Echoing its earlier opinion in *Hazen Paper*, the *St. Mary's* Court held that even convincing evidence of disparate treatment and pretext would not, by itself, compel a finding of impermissible discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-1 *et seq.* ("Title VII"), because Title VII prohibits discrimination rather than perjury. As in this case, the Court recognized that the fact that an employer may have given a false reason for its action will not, in all circumstances, warrant the conclusion that the employer acted from discriminatory motives. *See St. Mary's*, 113 S. Ct. at 2756. The Court did not address -- because no such issue was before it -- the question of what evidence would suffice to permit a finding of impermissible discrimination, except to say in dictum that:

"The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination."

See St. Mary's, 113 S. Ct. at 2749.

The Court's observation about what might permit a finding of discrimination in some cases was not essential to the holding in *St. Mary's*, and in no way addressed the situation existing in the present case -- *i.e.*, an allegation by the plaintiff, and a finding by the jury, that the employer had acted from an unsavory motive that was wholly unrelated to *age discrimination*. Nonetheless, in its initial opinion on remand, the First Circuit relied upon *St. Mary's* to hold (once again) that the evidence of pretext in this case *required* an affirmance of the jury's age discrimination verdict. Thus, after reciting precisely the same evidence it had referenced in its earlier opinion to support a finding of intentional pension interference -- *i.e.*, the fact that Biggins had been the only employee asked to sign a confidentiality agreement, and his younger replacement (who was not close to pension vesting) was given a less onerous contract -- the First Circuit stated:

> "Reading *Hazen Paper* and *St. Mary's* in tandem *compels* us to conclude that, absent any interference with the vesting of plaintiff's pension, there was sufficient evidence for the jury to find an ADEA violation."

(Pet., at 26a (emphasis added).)

The Hazens thereafter filed a timely petition for rehearing and suggestion of rehearing *en banc* from the First Circuit's decision. That petition was taken under advisement for several months.

On March 1, 1994, the First Circuit, sitting *en banc* issued an order directing the parties to show cause why, in light of the danger that the original jury took negative account of the Hazens' ostensible desire to deprive Biggins of a pension in reaching its ADEA verdict, the matter should not be remanded to the District Court for a full new trial of plaintiff's ADEA claim. (Pet., App. C.) On June 27, 1994, after reviewing the parties' responses to its show cause order, the *en banc* court issued a

further order (the "en banc order") withdrawing the panel's October, 1993 decision and remanding the ADEA claim to the District Court for a full new trial. In issuing this *en banc* decision, the Court stated:

> "The show cause order issued on March 1, 1994. The court has now received the memoranda filed by the parties in response to this show cause order and has concluded that the likelihood of verdict contamination with respect to the count at issue is sufficiently great that the interests of justice require a full new trial on the age discrimination claim."

(Pet., at 9a.)

Biggins thereafter filed a petition for rehearing of the en banc order. On August 10, 1994, the Court denied Biggins' request for rehearing. (Pet., at 2a.) The instant Petition followed.

II. REASONS FOR DENYING THE WRITS

The decision of the Court of Appeals remanding Biggins' ADEA claim to the District Court for a new trial is fully consistent with the Seventh Amendment and Rule 38 of the Federal Rules of Civil Procedure. The decision is likewise consistent with the Court's prior mandate in this case. The Petition submitted by Biggins presents no issue warranting review by this Court, either by writ of certiorari or writ of mandamus.

Biggins' Petition fundamentally misperceives the latitude afforded a reviewing court by the Federal Rules and the United States Constitution to correct judgments which, if allowed to stand, might otherwise work a serious injustice. Moreover, in suggesting that the First Circuit's *en banc* court merely "speculated" that the jury might have relied on evidence of pension interference to find age discrimination, Petitioner disregards the very theory of liability which he argued to the jury at trial and to every reviewing court thereafter. Finally, the Petitioner raises no legal issue that even remotely satisfies the high standards set by this Court for granting

review on writ of certiorari. For each of these reasons, the Petition should be denied.

With respect to the Petitioner's alternative request for writ of mandamus, nothing in the First Circuit's en banc order violates the terms of this Court's mandate, or fails to give full and proper effect to this Court's prior rulings. To the contrary, applying this Court's dictate that evidence of pension interference could not properly have played any role in the jury's decision, the First Circuit fairly concluded that, regardless of whether the remaining evidence of age discrimination was sufficient to support a verdict in Biggins' favor, there was, nonetheless, a substantial risk that jurors might have fallen prey to the very error of reasoning urged on them by Petitioner. In remediating this risk through the grant of a new trial, the First Circuit has faithfully adhered to this Court's judgment, and has not so departed from the Court's mandate as to warrant the extraordinary writ sought by Petitioner.

A. *The First Circuit's En Banc Order Of A New Trial Was Well Within The Court's Authority, Warranted By The Facts Of This Case, And Fully Consistent With The Seventh Amendment To The United States Constitution.*

In his Petition to this Court, Biggins asserts that a new trial may only be ordered by the trial court and that -- even if an appellate court could grant a new trial -- it could not do so on the grounds set forth in the First Circuit's en banc order. The Petition further asserts that the First Circuit merely "assumed" that the jury might have been misled by the evidence and argument advanced by plaintiff below, and that the en banc order for a new trial represents some vast and unprecedented incursion into the right to jury trial guaranteed by the Seventh Amendment. These arguments will not withstand scrutiny, and provide no grounds for invoking this Court's discretionary review by writ of certiorari.

1. *The En Banc Court Acted Well Within Its Inherent And Statutory Authority In Ordering A New Trial Based On Likelihood Of Jury Confusion.*

Petition asserts that an appellate court lacks the authority to order a new trial where, as here, it finds a substantial danger that the jury was confused in reaching its verdict. This is simply wrong. The power of an appellate court to order new trials is expressly recognized in 28 U.S.C. § 2106. That statute provides that a court of appellate jurisdiction may, in all cases before it, "remand the cause and . . . require such further proceedings to be had as may be *just under the circumstances*." (Emphasis added.) *See, e.g., United States v. Morow,* 182 F.2d 986, 989 (D.C. Cir. 1950) (noting statutory authority of appellate courts to order new trial); *see also Samuels v. Health and Hospitals Corp.*, 591 F.2d 195, 199 (2d Cir. 1979) ("Like trial courts, an appellate court has the authority to grant a new trial in the interest of justice"). *Accord Furr v. Herzmark,* 206 F.2d 468, 472 (D.C. Cir. 1953); *Atkinson v. Dixie Greyhound Lines,* 143 F.2d 477, 479 (5th Cir.), *cert. denied,* 323 U.S. 758 (1944); *Thompson v. Company,* 167 F.2d 733, 734 (6th Cir.), *cert. denied,* 335 U.S. 824 (1948); *Brown v. Richard H. Wacholz, Inc.*, 467 F.2d 18, 21 (10th Cir. 1972); *Camalier & Buckley-Madison, Inc. v. Madison Hotel, Inc.*, 513 F.2d 407, 420-21 n.94 (1975).[3]

Acting pursuant to this authority, numerous federal courts of appeal have in fact ordered a new trial where, as here, they have found a substantial likelihood that the jury was confused when it reached its verdict on a claim before it. *See, e.g., Davet v. Maccarone,* 973 F.2d 22, 28 (1st Cir. 1992) (where confusion likely, new trial proper if it "could have affected the result of the jury deliberations"); *Latsis v. Chandris, Inc.*, 20 F.3d 45, 53 n.4 (2d Cir. 1994) (new trial ordered where jury confusion

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[3] *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33 (1980), cited by Petitioner, is not to the contrary. *Allied Chemical* merely stands for the proposition that a district court's decision whether to order a new trial is a discretionary one, *not* that the district court alone has the discretion to make such an order.

likely); *Malcolm v. National Gypsum Co.*, 995 F.2d 346, 352 (2d Cir. 1993) (new trial ordered to remedy likelihood of jury confusion); *Savarese v. Agriss*, 883 F.2d 1194, 1205 (3d Cir. 1989) (new trial ordered where jury may have been confused on issue of liability); *Dixon v. CSX Transportation, Inc.*, 990 F.2d 1440, 1444 (4th Cir. 1993) (new trial ordered where jury may have confused theories of liability); *Folks v. Kirby Forest Indus.*, 10 F.3d 1173, 1178 (5th Cir. 1994) (jury confusion warrants new trial); *Chonich v. Wayne County Community College*, 973 F.2d 1271, 1282 (6th Cir. 1992) (*en banc*) (case remanded for second time for new trial due to possibility of jury confusion); *Wagner v. Case Corp.*, ____F.3d ____, 1994 WL 469864, at *1 (10th Cir. 1994) (where jury may have been misled and extent of confusion unknowable, new trial ordered by appellate court); *Somer v. Johnson*, 704 F.2d 1473, 1478 (11th Cir. 1983) ("the possibility that the jury may have employed the wrong criterion of liability . . . requires a new trial"); *United States Fire Ins. Co. v. Pressed Steel Tank Co.*, 852 F.2d 313, 317 (7th Cir. 1988) (where jury may have been confused, new trial ordered); *Farmland Industries, Inc. v. Morrison-Quirk Grain Corp.*, 987 F.2d 1335, 1343 (8th Cir. 1993) (new trial ordered where jury may have been confused; "We are left with substantial and ineradicable doubt whether the jury has been properly guided in its deliberations"); *Harper House, Inc. v. Thomas Nelson, Inc.*, 889 F.2d 197, 207 (9th Cir. 1989) (same); *Edmonds, Inc. v. McPherson Building Corp.*, 332 F.2d 309, 311 (D.C. Cir. 1964) (though evidence was properly admitted for one purpose, danger that jury may have been confused and misapplied such evidence in finding liability required new trial).[4]

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[4] Petitioner's refrain that the jury charge with respect to ADEA liability was not erroneous completely misses the point. The issue identified by the *en banc* court is not that the trial judge's charge was in error, but that Biggins' presentation of the case asked the jury to find liability on an impermissible basis. Thus, even if the jury faithfully followed the trial judge's instructions, nothing in those instructions would have prevented the improper outcome (*i.e.*, reliance upon pension interference as proof of age discrimination) which Biggins himself sought.

That the risk of jury confusion requiring a new trial may result from the misleading argument of counsel (even where such argument is not inflammatory), is equally well settled. *See, e.g., McInnis v. A.M.F., Inc.*, 765 F.2d 240, 251 (1st Cir. 1985) (emphasis placed on improper evidence during both examination of witness and closing arguments "compels us to conclude that the jury most likely drew the desired but improper inference"); *Ayoub v. Spencer*, 550 F.2d 164, 170 (3d Cir. 1977) ("Reversible error is committed when counsel's closing argument to the jury introduces extraneous matter which has a reasonable probability of influencing the verdict"); *Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338, 1350-55 (3d Cir. 1975) (new trial required where counsel argued merits of liability on basis of evidence properly admitted only to show witness bias); *Leathers v. General Motors Corp.*, 546 F.2d 1083, 1086 (4th Cir. 1976) (opening statement which asked jurors to place themselves in plaintiff's position required new trial after verdict for plaintiff); *Werner v. Upjohn Co.*, 628 F.2d 848, 854 (4th Cir. 1980) (new trial ordered where counsel erroneously argued that evidence admitted for another purpose could establish liability); *Rommel-McFerran Co. v. Local U. No. 369, Int. Bro. of Elec. Wkrs.*, 361 F.2d 658 (6th Cir. 1966) (holding that where counsel brought unrelated subjects to bear on jury's decision, "and, where there is a reasonable probability that the verdict of the jury has been influenced by such conduct, it should be set aside"); *Murphy v. L&J Press Corp.*, 558 F.2d 407, 411 (8th Cir. 1977) (argument of counsel that evidence admitted only for another purpose could establish liability required new trial; general instruction that the court, and not the lawyers, will instruct the jury on matters of law held insufficient to preclude possibility of tainted verdict).

Nor was the *en banc* court precluded from ordering a new trial because counsel for the Hazers failed to request an instruction that the jury not consider evidence of pension interference in reaching its age discrimination verdict, as Petitioner suggests. *See, e.g., City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 256 (1981) (appellate review of jury instructions proper to correct plain error, even in the absence of timely objection); *Morris v. Travisono*, 528 F.2d 856, 859 (1st Cir. 1976)(same); *Bereda v. Pickering*

Creek Indus. Park, 865 F.2d 49, 53 (3d Cir. 1989) (defendant's failure to request instruction on damages limit in discrimination suit held no bar to review for plain error; new trial ordered); *see generally Rodrique v. Dixilyn Corp.*, 620 F.2d 537, 540 (5th Cir. 1980) (collecting cases). Review is equally available on appeal as to improper argument of counsel, even in the absence of a contemporaneous objection. *See, e.g., Leathers, supra*, 546 F.2d at 1086. Moreover, where, as here, the substantive legal issue as to which an instruction might have been sought (*i.e.*, the relevance of pension interference to a claim of age discrimination) was itself uncertain at the time of trial, appellate review need not be limited to a search for plain error. Rather, "[t]he very novelty of the legal issue at stake counsels unconstricted review," and such plenary consideration is authorized "in the interests of justice" by 28 U.S.C. § 2106. *City of Newport, supra*, 453 U.S. at 257 & n.16 (vacating jury verdict and remanding for further proceedings, notwithstanding absence of either plain error or contemporaneous objection).

Petitioner further suggests that, in ordering a new trial, the First Circuit impermissibly reviewed the actions of the trial court for an "error of fact," and therefore failed to accord that court the deference due it.[5] This argument also lacks merit. The First Circuit's en banc order is premised on the jury confusion likely resulting from the error of *law* (*viz.*, the theory that a denial of pension benefits could stand in for proof of age discrimination) which was urged by Petitioner, and accepted by the District Court and First Circuit panel prior to this Court's unanimous decision to the contrary. Thus, in attempting to remedy the likely jury confusion

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[5] That the *en banc* court raised the issue of jury confusion *sua sponte* provides no basis for review by this Court. It is well settled that an appellate court may notice error "not presented by the parties ... *Washington v. Davis*, 426 U.S. 229, 238 (1976); *Silber v. United States*, 370 U.S. 717, 718 (1962), decide an issue not raised in the lower federal courts, *see Carlson v. Green*, 446 U.S. 14, 17 n.2 (1980), or review an issue neither decided below nor presented by the parties, *see Wood v. Georgia*, 450 U.S. 261, 265 n.5; *Youakim v. Miller*, 425 U.S. 231, 234 (1976)." *City of Newport, supra*, 453 U.S. at 257 n.15.

engendered by an erroneous legal theory pressed at trial, the First Circuit in no way invaded the proper domain of the trier of fact.[6]

For all of these reasons, the en banc order was well within the power of the Court of Appeals to issue. The arguments of the Petition to the contrary are without basis, and should be rejected.

2. *The En Banc Court's Concern Over The Likelihood Of Jury Confusion Was Well-Founded In The Record.*

The Petition next asserts that, in finding a likelihood of jury confusion, the *en banc* court improperly "assumed" or "speculated" -- without any foundation -- that the jury might have considered evidence of pension interference in reaching its age discrimination verdict. (*See* Pet., at p. 12.)

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[6] Similarly, the suggestion that the District Court had already addressed the issue of jury confusion, and that its ruling conformed to this Court's decision and must somehow be accorded deference, is spurious. In denying the defendant's post-verdict motion for new trial, the District Court ruled, correctly, that an employer could be motivated by both age animus (in violation of the ADEA) *and* a desire to defease protected pension rights (in violation of ERISA). The District Court never ruled, however, that the jury's consideration of the age issue was uninfluenced by the evidence of pension interference. To the exact contrary, the District Court held that age discrimination *could* be inferred if evidence of pension interference were considered, precisely the rationale which this Court later rejected. Such a determination, made on the basis of a mistake of law, is entitled to no deference from an appellate court (*see 6A Moore's Federal Practice*, at p. 59-140 (1994 ed.)), and in any event does not address the jury confusion issue raised by the en banc order. Nor does the en banc order in any way suggest that ERISA and ADEA claims cannot be tried together, as Petitioner has asserted. (*See* Pet., at pp. 16-17.) Rather, the First Circuit merely gave effect to this Court's command that, where the two causes of action *are* tried together, the evidence of one type of discrimination not be allowed to substitute for proof of the other.

This argument is frivolous. As a review of the proceedings below readily makes clear, the First Circuit's conclusion that the jury may have taken negative account of pension interference in finding age discrimination is abundantly supported by the record.

From his filing of the Complaint in this matter forward, Petitioner has consistently asserted his view that age discrimination may be inferred from the Hazens' purported desire to deprive him of pension benefits. (*See* Complaint, Count I (Age Discrimination), ¶ 18 ("The conduct of the defendants in terminating the plaintiff's employment, replacing him with a younger individual, and acting to deprive him of his pension benefit constitutes illegal age discrimination in violation of 29 U.S.C., Section 623.") The jury was asked to reach this same conclusion through the opening statement of Petitioner's counsel ("Biggins knew that the technical department was comprised of four people. Himself, age sixty-two and nearing pension vesting [and] [t]hree people in their thirties . . .. This age was used against him to attempt to force him to sign over [a manufacturing] process and to attempt to take away from him valuable rights. . . ."). Petitioner's counsel made the same appeal again in his closing argument ("Sixty-one, sixty-two. Almost vested in his pension. But they needed the pretext.") (*See* Trial Transcript, at pp. 237, 1053.)

Indeed, so effectively did Petitioner's counsel urge the identity between pension interference and age discrimination that the jury, the District Court and the pre-remand First Circuit panel were all persuaded by the argument. Only now, after this Court has declared that pension interference does not equal age animus, does Petitioner brand as "speculative" the view that the jury might improperly have taken account of pension evidence in rendering its ADEA verdict. Having himself led the jury (and each of the courts below) into the precise error condemned by this Court, however, Petitioner can hardly be heard to complain that the *en banc* court panel engaged in "speculation" when it concluded that the jury might have followed that

lead. *See Schneider v. Lockheed Aircraft Corp.*, 658 F.2d 835, 849 (D.C. Cir. 1981) ("If the judge was confused, we have no difficulty believing that the jury was also confused.").[7]

3. *The En Banc Court's Order Is Fully Consistent With The Requirements Of The Seventh Amendment.*

It is beyond dispute that a new trial may be ordered by an appellate court to correct errors of law, and that such an order does not violate the Seventh Amendment's re-examination clause. *See, e.g., Parsons v. Belford,* 3 Pet. 433, 447-48 (1830); *Capital Traction Co. v. Hof,* 174 U.S. 1, 13 (1899) (under the Seventh Amendment, "re-examination is allowed . . . upon a new trial, either granted by the court in which the first trial was held or to which the record was returnable, or ordered by an appellate court for error in law").

As set forth above, The First Circuit's en banc order rests squarely on the error of law injected by Petitioner into the trial proceedings. The First Circuit's order in no way intrudes upon the right to trial by jury, or reexamines any finding of fact (except to the extent that such finding was premised on an error of law). In remanding for a new trial, "it might be well . . . to point out that [the First Circuit did] not, in effect or in spirit, direct[ ] a verdict for [the Hazens]. . . . All that [is] expect[ed]on remand is that [the Hazens] have the opportunity to fairly and impartially present [their] case, that [Biggins] be awarded the same opportunity and that the issues remain clear." *Murphy, supra,* 558 F.2d at 412. Nothing in the First

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[7] Petitioner's suggestion that, in ordering a new trial, the First Circuit was required to determine to a certainty that the jury was misled is, of course, unfounded. *See, e.g., Coleman Motor Co., supra,* 525 F.2d at 1351, n.19 (new trial required where "it is impossible to tell what factors influenced the jury's decision"); *Wagner v. Case Corp., supra* (same); *Farmland Industries, Inc., supra* (same). The rationale for a new trial is particularly strong where, as here, the evidence supporting the jury's verdict was "thin". *See Leathers, supra,* 546 F.2d at 1086.

Circuit's order contravenes the requirements of the Seventh Amendment. Instead, the en banc order merely affords to both parties the very right to a fair trial which the Seventh Amendment guarantees.

4. *The Petition Demonstrates No Other Basis Warranting Review By Writ Of Certiorari.*

Finally, Petitioner complains that the First Circuit's en banc order will require still further proceedings in what has already been a protracted course of litigation. (Pet., at p. 25.) Any further delay or expense is, of course, unfortunate, and redounds equally to the detriment of both parties. Mere inconvenience, however, provides no basis for overriding the substantial concerns for justice properly identified by the First Circuit; and it is difficult to conceive how seeking further review in this Court, rather than proceeding promptly to a new trial, can better serve the interests of expedition.

Moreover, the protracted nature of this litigation -- as well as the prospect of a new trial -- reflects in great measure the time required to correct the legally erroneous theory of liability urged by Petitioner below and argued by him before this Court in earlier proceedings. Having himself sown the seeds of error, and indeed having nurtured them at every turn, Petitioner cannot credibly complain that the process of rectification is unduly slow.

In sum, Petitioner has failed to demonstrate any error in the decision of the First Circuit, has not identified any disagreement among the Circuits with respect to any issue of law raised by that decision, and has failed to identify any other reason why this Court should exercise its discretionary jurisdiction under 28 U.S.C. § 1651(a). Accordingly, the Petition for Writ of Certiorari should be denied.

B. *Mandamus Is Unwarranted Because The Ruling Of The First Circuit Is Fully Consistent With This Court's Mandate In The Present Case, And With The Court's Decision In St. Mary's Honor Center v. Hicks.*

In support of his Petition for Writ of Mandamus, Biggins urges that the First Circuit's en banc order violates the mandate of this Court, and is inconsistent with this Court's decision in *St. Mary's Honor Center v. Hicks, supra*. Neither argument is supportable.

1. *The En Banc Order Is Fully Consistent With This Court's Mandate.*

As the Petition correctly observes, a lower court is "bound to carry the mandate of [an] upper court into execution and could not consider the questions which the mandate laid at rest." *Sprague v. Ticonic Nat'l Bank,* 307 U.S. 161, 167 (1939) (quoted at Pet., at p. 25). However, as this Court's opinion in *Sprague* also makes clear, "[w]hile a mandate is controlling as to matters within its compass, on the remand a lower court is free as to other issues." *Id.* Similarly, this Court has held that, on remand, "the Circuit Court may consider and decide any matters left open by the mandate of this court; and its decision of such matters can be reviewed by a new appeal only." *In Re Sanford Fork & Tool Co.,* 160 U.S. 247, 256 (1895); *accord Wells Fargo & Co. v. Taylor,* 254 U.S. 175, 181-82 (1920) (appellate decision that pleadings were inadequate does not preclude lower court's allowance of amendment to the pleadings); *Quern v. Jordan,* 440 U.S. 332, 348 n.18 (1979) ("The doctrine of law of the ease comes into play only with respect to issues previously determined"; holding that where Supreme Court had previously reversed an award of money damages, Circuit Court was not barred from awarding notice relief). The issue of jury confusion raised in the en banc order was not even addressed -- much less laid to rest -- in this Court's earlier decision. To the contrary, this Court's decision merely provided the legal predicate (*i.e.*, the ruling that evidence of pension interference could not properly substitute for evidence

of age bias under the ADEA) on which the en banc order was founded.

This Court's decision in *Deen v. Hickman*, 358 U.S. 57 (1958), relied on by Petitioner, is not to the contrary. In *Deen*, this Court in an earlier decision had reversed a decision by the state's intermediate court of appeals that there was insufficient evidence to sustain a jury verdict. This Court found that "the proofs justified with reason the jury's conclusion," and therefore reversed the state appeals court. *See Deen v. Gulf, Colorado & Santa Fe R. Co.*, 353 U.S. 925 (1957). On remand, the state's intermediate appeals court affirmed the judgment in favor of the petitioner, subject to a remittitur. On further review, however, the state Supreme Court remanded the case again to the intermediate court of appeals, "with directions . . . to adjudicate, upon its own independent evaluation of the evidence and wholly apart from the judgment of the Supreme Court of the United States, whether or not the jury finding . . . is so against the weight and preponderance of the evidence as to require a new trial . . .." *Deen v. Hickman, supra*, 358 U.S. at 57-58.

Not surprisingly, having already considered the sufficiency of the evidence in its earlier decision, this Court found in *Deen* that any re-determination of the weight of evidence on remand was foreclosed by its original decision, and that the instruction that the intermediate court of appeals act "wholly apart from the judgment of the United States Supreme Court" could not be given effect. In the present case, by contrast, this Court has never passed on the sufficiency of the evidence (except to suggest that a finding of age discrimination may be "problematic"), and has certainly never considered the issue of jury confusion, which was clearly presented for the first time by this Court's own holding that pension interference does not equate to age discrimination. *Deen* thus in no way controls the case at bar.

Moreover, this Court's holding in *Deen* had the effect of reinstating the jury's verdict, and thereby terminating the litigation. This Court's ruling in the present case, by contrast, specifically raised the question whether the jury's verdict could still be sustained in light of the Court's holding that

pension interference did not euqal age discrimination, and thus instructed the First Circuit to address that issue. This, of course, is precisely what the Court of Appeals, sitting *en banc* has done. Accordingly, rather than disobey the Court's mandate in this case, the *en banc* court complied with it fully. *See, e.g., In Re Sanford Fork & Tool Co., supra,* 160 U.S. at 259 ("The case being thus left open, by the opinion and mandate of this Court . . . for further proceedings . . . the Circuit Court might, in its discretion, [order a new trial]." *Id.* Petitioner had no reasonable basis for suggesting otherwise.[8]

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[8] The other cases relied on by Petitioner are equally unavailing. *Sibbald v. United States,* 37 U.S. (12 Pet.) 488 (1838), for example, holds only that the Circuit Court on remand may not question any finding which the Supreme Court has confirmed. At the same time, *Sibbald* recognizes that the Circuit Court must "determine all questions arising (in the mandate's execution) . . . [and] cause further to be done therein, what of right, according to law and justice, in conformity to the opinion and decree of this Court, ought to be done." *Id.* at 495 (emphasis original). Likewise, *United States v. Smith,* 331 U.S. 469 (1947), held improper a District Court's order of a new trial after remand solely on the ground that the court was limited in its exercise of that power by the requirement, under Fed. R. Crim. P. 33, that such an order issue within five days of the verdict, a limitation not imposed on an appellate court under 28 U.S.C. § 2106. *General Atomic Co. v. Felter,* 436 U.S. 493 (1978), merely holds that a state court cannot lawfully order the precise relief which an earlier opinion of the Superior Court has foreclosed, *id.* at 496, and plainly has no bearing on the present case. Similarly, in *Briggs v. Pennsylvania R. Co.,* 334 U.S. 304 (1948), the court of appeals had construed its own mandate as not permitting interest to be added to a verdict which it had affirmed, and had stricken interest added by the District Court on remand. The decision by this Court that the district judge's attempt to add interest could not stand in the face of the appellate court's mandate to the contrary is unexceptional, and obviously irrelevant to the present dispute. In *Gaines v. Rugg,* 148 U.S. 228, 240 (1893), this Court held that, on remand, a lower court could not take new evidence in support of exceptions to a decree which this court had previously affirmed. In the present case, this Court's decision has not affirmed, but has instead vacated the decision below, making further proceedings not only proper but necessary. Finally, in *In Re Potts,* 166 U.S. 263 (1897), the Circuit Court was found improperly to have entertained new evidence of the invalidity of certain

In sum, nothing in the First Circuit's en banc order remotely amounts to such a "judicial usurpation of power" that the "extraordinary remedy [of mandamus]" would be warranted. *Will v. United States*, 389 U.S. 90, 95 (1967) (quoting *DeBeers Consol Mines, Ltd. v. United States*, 325 U.S. 212, 217 (1945)). To the contrary, the *en banc* order is fully consistent with this Court's prior opinion, and Petitioner cannot hope to meet his "burden of showing that [his] right to issuance of the writ is 'clear and indisputable.'" *Id.* at 96 (quoting *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 384 (1953)).

2. *Nothing In The First Circuit's En Banc Order Is Inconsistent With This Court's Decision In St. Mary's Honor Center v. Hicks.*

In an apparent attempt to elevate the *en banc* court's unexceptional ruling into a matter warranting further review by this Court, Petitioner asserts that the First Circuit's decision is at odds with this Court's opinion in *St. Mary's Honor Center v. Hicks, supra*. (*See* Pet., at p. 27.) This argument misconstrues the dictum in *St. Mary's* on which it relies, and is in any event wholly beside the point of the en banc order.

Petitioner argues, based on a dictum of this Court in *St. Mary's*, that a finding of discrimination is warranted in *every* case in which a plaintiff makes out a *prima facie* showing of discrimination and also satisfies the trier of fact that the employer's proffered reason for its action is not the true reason. This is so, Petitioner claims, even where the evidence would not otherwise support a finding of discrimination, and even where the evidence

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patents which this Court had previously found to be valid. Plainly, *Potts* has no bearing on the present case. Moreover, to the extent that *Potts* relied on the former rule (no longer followed) that a lower court must seek appellate leave before initiating further proceedings on remand, it has been overruled. *See Standard Oil Co. v. United States*, 429 U.S. 17, 18 n.2 (1976). "[T]he appellate mandate relates to the record and issues then before the court, and does not purport to deal with possible later events." *Id.* at 18.

establishes that the employer's true reason for its action was unrelated to prohibited discrimination. This theory, if adopted, would turn the discrimination laws into "perjury statutes," the very result rejected by this Court in *St. Mary's,* and would at the same time permit the imposition of liability where no discriminatory animus could fairly be inferred. Indeed, it was precisely such a scenario which this Court described as "problematic" in remanding the case at bar to the First Circuit.

The dictum in *St. Mary's,* in fact, requires no such result. Rather, as the Court was careful to note: "The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) *may*, together with the elements of the *prima facie* case, suffice to show intentional discrimination." *See St. Mary's,* 113 S. Ct. at 2749 (emphasis added). That such evidence may, *in some cases*, suffice to show discrimination hardly suggests that it will suffice in every case. This is particularly true where, as here, the evidence points to other unsavory motives (such as pension interference) that are not discriminatory.[9]

More fundamentally, Petitioner's argument concerning *St. Mary's* is beside the point. Even if the evidence were sufficient to support a finding of discrimination, this would hardly be a bar to a determination that the

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[9] Petitioner argues that anything less than an "all-or-nothing" approach to evidence supporting disbelief of an employer's proffered reason would involve the courts in an impermissible "weighing" of the evidence. This argument is without merit. The issue, in every case, will be whether the quantum of evidence adduced by the plaintiff is sufficient to permit a reasonable jury to infer that, more likely than not, discrimination has occurred. This kind of weighing of the evidence (as distinct from an inquiry into the believability of the evidence) is, of course, what the court must properly do in deciding a motion for judgment n.o.v. in every case.

jury may have been confused and improperly relied on impermissible evidence in reaching the conclusion it did.[10] This was the concern which animated the *en banc* order.

In sum, nothing in the First Circuit's *en banc* order fairly draws into dispute the proper interpretation of this Court's decision in *St. Mary's*. Moreover, even if a finding of discrimination were supportable, such a finding would in no way be inconsistent with the *en banc* order of a new trial.

III. CONCLUSION

For all the foregoing reasons, the Petition For Writ Of Mandamus/Certiorari should be denied.

Respectfully submitted,

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Dated: October 25, 1994

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[10] Indeed, only if the evidence were sufficient to *require* a verdict in Petitioner's favor would the First Circuit's "jury confusion" analysis have been unwarranted. As the District Court observed, however, the evidence of age discrimination was, at best, "thin." Moreover, this Court squarely held in *St. Mary's* that disbelief of an employer's articulated rationale does *not* require a verdict for the plaintiff in a discrimination suit, and no different conclusion can obtain in the present case.

(A)

No. 94-588

SUPREME COURT, U.S.
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In The

Supreme Court of the United States

October Term, 1994

In Re

WALTER F. BIGGINS,

On Petition for a Writ of Mandamus/or in the Alternative, for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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I. Respondents' Opposition Concedes the Requirement of an Error of Law for an Appellate Court to Order a New Trial But Ignores the Fact That the Circuit Court Found No Error.

Respondents' brief makes clear that the circumstances of this case provide no justification for the en banc court's extraordinary action in ordering a new trial sua sponte based on its suspicions about the jury verdict. Respondents' opposition effectively concedes the petitioner's major premise: that absent an error of law, an appellate court has no power to order a new trial. Respondents do not dispute this, but rather attempt to contrive a justification for the en banc court's order by asserting that the en banc court's order "rests squarely" on an error of law, which the respondents variously describe as the petitioner's "theory" of the case (Resp. brief, p. 12), or its "presentation of the case" (Resp. brief, p. 10, n.4). Thus the respondents argue that (a) there is authority for the awarding of a new trial where an error of law has created jury confusion, and (b) the Circuit Court here "identified" such an error, (c) therefore, there was no violation of the Seventh Amendment or of this Court's mandate.

Respondents' argument is a house of cards which collapses on even superficial scrutiny. Its most obvious flaw is that the en banc court's order does not "identify" any error of law. Respondents attempt to contrive the existence of one in order to find some possible justification for the en banc court's order.

The petitioner did not argue that a Circuit Court does not have the power to grant a new trial *when it finds error below* that has been properly raised and addressed. The opposition on pages 9, 10 and 11 provides twenty-seven separate citations which they assert stand for the proposition that "numerous federal courts of appeal have in fact ordered a new trial where, as here, they have found a substantial likelihood that the jury was confused when it reached

its verdict on a claim before it." (Resp. brief, p. 9). Each and every one of those cases involves a situation where the Circuit Court found prejudicial errors of law in the proceedings below. The first issue presented by the petitioner to this Court is whether the Court of Appeals could order a new trial *sua sponte* based on its speculation about the jury *where there was no finding of error in the proceedings below.* (Pet. p. i). The respondents' opposition fails to cite one case where a Circuit Court has ordered a new trial without a finding of prejudicial error below. The respondents' attempt to ignore or confuse the real issue presented in the petition evidences the correctness of the petitioner's position that a Circuit Court has no independent authority to grant a new trial based on its own view of the evidence.

To justify the en banc court's order, the respondents eventually claim it must be the result of a finding of an error of law in the proceedings below. (Resp. brief, p. 15). The order of the en banc court not only finds no error in the proceedings below, it never mentions the word error at all, let alone find an error occurred and determine it to be prejudicial. (Pet. App. B, 9a-12a). Instead of finding error, the circuit muses about " . . . the likelihood of verdict contamination with respect to the count at issue [being] sufficiently great that the interests of justice require a full new trial on the age discrimination claim." (Pet. App., p. 9a).

The circuit having failed to find error below, and the case law requiring it, the respondents simply "fill in the blanks" and attempt to divine the reasons for the imaginary error they have manufactured out of the en banc court's order. Respondents claim the "error" creating jury confusion consists of the contents of the petitioner's complaint and two sentences, one from petitioner's opening statement and one from his closing statement:

> . . . ("Biggins knew that the technical department was comprised of four people.

> Himself, age sixty-two and nearing pension vesting [and] [t]hree people in their thirties . . . . This age was used against him to attempt to force him to sign over [a manufacturing] process and to attempt to take away from him valuable rights . . . .”). . . .(“Sixty-one, sixty-two. Almost vested in his pension. But they needed the pretext.”) *(See* Trial Transcript, at pp. 237, 1053.)

(Resp. brief, p. 14).

These events cannot support a claim of error. The jury never saw the Complaint, so it obviously could not have confused them.[1] The references to four lines in a five day trial transcript encompassing well over 1,000 pages and 25,000 lines serves simply to demonstrate the absurd lengths to which the respondents must go to attempt to justify the “error” they try to read into the opinion of the Circuit Court. The statements themselves show no more than that petitioner’s counsel mentioned age and pension in the same sentence twice in the entire trial, without even stating there was a connection between the two. The statements referenced are all factually correct and made in the context of a trial at which the jury was given separate instructions and special questions (including on damages) on the ADEA and ERISA issues.

This elusive “error” was never objected to at trial, was never argued in the post-trial motions, was never appealed or argued in any papers filed with the Circuit Court or at any of the circuit hearings, and yet today serves as the only explanation the

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1. Continuing in this vein, respondents also assign as part of the “error” supposedly creating jury confusion, the *post trial* sufficiency of the evidence arguments advanced to the District Court and the Circuit Court as if these legal arguments had somehow influenced the jury when in fact they were not presented to the jury at all. (Resp. brief at 14-15).

respondents can concoct to seek to justify an order of the Circuit Court which is devoid of any reference to an error of law. Indeed, what the respondents now refer to as "plain error" was never objected to or discovered by them until they filed this opposition to the petition. Even after this Court's opinion, respondents did not discover this "error" or present it to the First Circuit for consideration. More significantly, even after the March 1, 1994 (Pet. App., p. 13a) order of the en banc court, which contained the very same analysis and reasoning as its final order, the respondents made no reference whatsoever to this so called error, an error so "plain" and "obvious" it has taken respondents 4 1/2 years to discover it and has never been so much as mentioned by the District Court, the First Circuit panels (twice), this Court, or the en banc court itself.

The final, fatal flaw in the respondents' argument that the en banc court really found an error of law, but forgot to mention it, is the absence of any analysis by the en banc court of whether or not such error was actually prejudicial. Fed. R. Civ. P. 61 absolutely requires such analysis and is binding upon an appellate court. *McDonough Power Equip., Inc. v. Greenwood,* 464 U.S. 548, 554 (1984).

Respondents' opposition, therefore, is totally devoid of any challenge to those cases where this Court has directly affirmed the Seventh Amendment's limitations on the Circuit Courts' power to grant a new trial and has affirmed that absent a finding of prejudicial error below, the Seventh Amendment prohibits a Circuit Court from granting a new trial on its own. *Parsons v. Bedford, Breedlove & Robeson,* 28 U.S. 433, 447-8 (1830); *Capital Traction Co. v. Hof,* 174 U.S. 1, 13 (1899); *Allied Chemical v. Daiflon,* 449 U.S. 33, 36 (1980); *McDonough Power Equip., Inc. v. Greenwood,* at 556.

The clear reasoning of these cases compels the intervention of this Court to protect the Seventh Amendment rights of the petitioner and correct the Circuit Court's dangerous misapprehension of its power.

II. The Respondents Cannot Justify the Circuit Court's Failure to Adhere to the Mandate of this Court.

Respondents also fail to effectively dispute the Circuit's failure to adhere to this Court's mandate. Respondents' attempt to distinguish *Deen v. Hickman,* 358 U.S. 57 (1958), fails. The only distinction they can point to is that in *Deen* this Court itself passed on the sufficiency of the evidence rather than ordering the lower court to do so. That is not a distinction which would permit the Circuit Court to take a different course of action on a different issue. Respondents then blame this Court for having precipitated for the "first time" the issue of jury confusion by its opinion that the pension evidence could not be used to sustain the ADEA verdict. The assertion that this Court's opinion on the sufficiency of the evidence somehow unexpectedly "created" an issue of jury confusion is preposterous. Respondents had claimed from the time of the verdict that the pension evidence could not be used to support the verdict and raised that as the issue in their petition to this Court. Clearly if this issue also created the question of jury "confusion," respondents could have argued it long ago and brought it to this Court's attention.

Respondents go further still in attempting to distinguish *Deen* by arguing that after this Court instructed the First Circuit to address whether the verdict could be sustained, absent the pension interference evidence, the First Circuit then did "precisely" that (Resp. brief, p. 19). The en banc court's order says absolutely nothing about "whether the jury's verdict could be sustained" in light of this Court's opinion. Having first rewritten the en banc court's order to create an imaginary error of law, respondents now

further seek to rewrite the court's order to include an analysis of the sufficiency of the evidence which plainly does not exist.

That the respondents must, in order to find some possible justification for the en banc court's order, attempt to rewrite that order into something it is not, merely serves to dramatize how far afield the Court of Appeals has gone.

III. Even If the Alleged Error Existed It Could Not Properly Be Raised at this Time.

Assuming for the sake of argument that the en banc court found any error of law, and further assuming for the sake of argument that it could have had any power to order a new trial despite the *McDonough Power Equip., Inc.*, case, this issue still could not be raised sua sponte by the en banc court at this stage, and none of the cases cited by the respondents supports the notion that it could have been. It should be borne in mind that the alleged "error" which respondents claim exists and which they allege to be the subject of the en banc court's order was not objected to during trial, not objected to at the conclusion of trial, not raised in post trial motions, including a motion for new trial based on the possible confusion of age and pension discrimination, not raised in the first appeal to the First Circuit, not raised in the first rehearing petition to the First Circuit, not raised in the petition for certiorari to this Court, not raised in the briefs or oral argument before this Court, not raised on remand to the First Circuit, not raised in the respondents' petition for rehearing in the First Circuit, not raised in the briefs in response to the en banc court's order of March 27, 1994, which respondents allege was citing this "error" and not even mentioned in the en banc court's order.

To suggest that such an error which allegedly occurred at trial could now be raised by the court or the respondents makes a mockery of the appellate process.

There is simply no authority which would permit or even countenance the raising of a new "error" for the first time after this many proceedings, let alone *after* full argument and opinion in this Court. If such a practice is permitted to stand, no decision or verdict can ever be regarded as final, and every litigant will feel free to raise any possible issue or alleged error even after *multiple* appellate proceedings.

Respondents' cited authorities are not to the contrary. Respondents rely principally on *City of Newport v. Fact Concerts Inc.*, 453 U.S. 247 (1981). There, this Court held that it would review a jury instruction which was not objected to at trial (although the District Court addressed it post-trial) *not* because it was a "plain error,"[2] but because:

> In addition to being novel, the punitive damages question is important and appears likely to recur in §1983 litigation against municipalities. And here the question was squarely presented and decided on a complete trial record by the court of first resort, was argued by both sides to the Court of Appeals and has been fully briefed before this Court. In

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2. Respondents' assertion that the "novelty" of the legal issue here exempts them from the requirement of plain error would only mean that they would also have to meet the above *Newport* standards in order to be able to raise the issue at this stage, and this they cannot do. More importantly, *Newport* explains that there can be no "plain error" where standards are "evolving" and "uncertain" as respondents now allege they are. *Newport* at 256. Consequently, if respondents' excuse is the novelty of the issue, they must be held to the standard of *Newport* and cannot claim plain error. Nor can respondents reasonably claim that the "novelty" of the issue kept them from raising it: the issue of the pension evidence as support for the ADEA verdict is specifically addressed at least as far back as the District Court's opinion (Pet. App. F, p. 34a-35a).

> light of all these factors we conclude that restricting our review to the plain-error standard would serve neither to promote the interests of justice nor to advance efficient judicial administration.

Newport v. Fact Concerts at 257.

None of these standards applies here and no one could rationally suggest that the ordering of a new trial by the First Circuit promotes "efficient judicial administration" when it forces the parties to undo seven years of litigation and start all over again.

Respondents' other citations would not justify the en banc court raising the issue now. For instance, *Youakim v. Miller,* 425 U.S. 231 (1976), only *remanded* the case to the District Court to consider an issue raised by the complaint, but not previously dealt with. In *Wood v. Georgia,* 450 U.S. 261 (1981), a conflict of interest issue was *remanded* because the party's prior lawyer was himself the focus of the conflict claim and the other party had repeatedly raised the issue. *Wood v. Georgia,* 450 U.S. at 265, n.5. In *Carlson v. Green,* 446 U.S. 14 (1980), the question was presented in the petition for certiorari, was fully briefed, was an important recurring issue and the opposing party had no objection. *Carlson v. Green,* 446 U.S. at 17 n.2. In *Silber v. United States,* 370 U.S. 717 (1962), the issue was squarely considered by the trial court and was ruled an obvious error. No similar circumstance was presented here to the First Circuit, which received the case on remand, and the issue had never been previously raised either below at the First Circuit or *above* in this Court. Clearly the First Circuit's own standards would not permit the raising of a new issue at this time. In *Morris v. Travisono,* 528 F.2d 856, 859 (lst Cir. 1976), the Court "acknowledged the existence of the plain error exception" but stated (in deciding that review was *precluded* by failure to object at trial):

> . . . it is noteworthy that to the best of our knowledge this Court has *never* reversed a civil case on this basis . . . [I]f there is to be a plain error exception to Rule 51 at all it should be confined to the exceptional case where the error has seriously affected the fairness, integrity or public reputation of judicial proceedings.

Morris v. Travisono at 859 (Emphasis supplied).

Respondents, therefore, ask this Court to believe that the First Circuit, acting en banc, decided to do what it had never done in its entire history, without reference to what the error was and without any explanation as to why it was abandoning its longstanding principles.

IV. Respondent's Opposition Makes Clear the First Circuit's Refusal to Follow *St. Mary's Honor Center.*

Respondents do not confine themselves to rewriting the en banc court's order, they also strive to rewrite this Court's opinion in *St. Mary's Honor Center v. Hicks,* 113 S. Ct. 2742 (1993). Respondents' whole argument is premised on the assertion that *St. Mary's Honor Center* means that a factfinder's disbelief of the reasons put forward by the defendant may only suffice to show discrimination *in some cases* (Resp. brief, p. 21).

This is the interpretation of *St. Mary's Honor Center* which the First Circuit is now following, as petitioner noted in his Petition at pp. 27-30. In adopting this interpretation, the respondents (and the First Circuit) take this Court's unambiguous statements that a prima facie case together with disbelief of the defendants ' reasons and a finding of discrimination by the factfinder "may suffice, to show intentional discrimination," "*will* permit the trier of fact" to find intentional discrimination and "is *enough* at law to sustain"

such a finding and treats them as stating "sometimes" they will permit a finding. *St. Mary's Honor Center* at 2749 and n.4. Such an interpretation deprives *St. Mary's Honor Center* of any rational meaning and would permit a standardless review of the evidence by appellate courts who could then apply this Court's carefully developed statutory interpretation only when they felt like it.

Like the attempt to rewrite the en banc court's order, this rewrite of this Court's opinion makes clear that the Circuit Court is refusing to obey this Court's mandate to analyze the sufficiency of the evidence in light of St. *Mary's Honor Center* and that, consequently, this Court's intervention is necessary.

Respectfully submitted,

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